

# **Exposing Dead Air: Challenging the Constitutional Sufficiency of Uninsured Motorist Arbitration Procedures**

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## **I. INTRODUCTION**

The insurance defense lawyer sternly looks into the gaze of the inexperienced claimant who is seeking uninsured motorist (UM) coverage as the mandatory arbitration proceeds.

Defense Lawyer: Claimant, according to the skid marks analysis conducted by experts at the University, you were driving in excess of the speed limit as you changed lanes and collided with the uninsured driver.

Claimant: I was driving at the posted speed when the uninsured driver changed into the same lane I was going into, collided with me, and caused my injuries.

The defense lawyer, with a sigh of disbelief, focuses his eyes on the overflowing manila folder detailing the pertinent matters of the case. Silence permeates the room as the lawyer reviews the evidentiary material, flipping through pages of documents without posing any follow-up question. The tension builds as all of the arbitral actors, especially the claimant, await the defense lawyer's next action.

Claimant's Lawyer: I object to Defense Counsel not presenting a question. This silence is unfairly prejudicial to my client. If Counsel has questions, he should ask them rather than play these games.

Arbitrator: Overruled, Counsel. This is arbitration, not a trial held in court. Defense Counsel, you may proceed.

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\* I dedicate this article to my older brother, Faisal Amin, who continually pushes me to realize that anything and everything is possible with dedication, hard work, and a bit of luck. I would also like to thank all my family and friends back home in California for their constant support throughout the whole "Note Writing" process. The possibility of your rights being compromised while arbitrating an insurance claim was a motivating factor for me when deciding to explore this area of alternative dispute resolution. This article could not have been complete without the beneficial assistance and guidance I received from the 2005-2006 Associate Editors of the Ohio State Journal on Dispute Resolution. Finally, many thanks to the staff members and managing editors for taking time out of their demanding lives to ensure that this Note is in its best possible version for publication.

Close to a minute has passed since the claimant finished his response, yet the defense lawyer continues to sift through the thick case file without posing a question.

Claimant: Well, I might have been going a bit over the speed limit, but this did not make me reckless in any way. I was changing lanes routinely. I mean, maybe I should have checked my blind spot before moving into the lane, but the speed definitely did not cause the accident. It was the uninsured driver who should not have been drinking and driving.

The defense lawyer quickly drops his papers and proceeds to jump on the inconsistency he created in the claimant's testimony.

Defense Lawyer: Oh, so you did not check your blind spot before changing lanes. Would you agree that your failure to check your blind spot contributed to the accident?

Claimant: I should have checked my blind spot, but the uninsured driver was more at fault than I was because he was driving drunk.

Defense Lawyer: Thank you, no further questions.<sup>1</sup>

The preceding episode took place during a UM arbitration between the insured claimant who sought coverage and the insurance defense lawyer who utilized techniques to minimize the company's liability to its insured. Based on this proceeding, the claimant is not likely to obtain an arbitral award up to the policy limits because he disclosed to the arbitrator his possible role in causing the accident.<sup>2</sup>

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<sup>1</sup> This simulation of a mandatory UM arbitration and the characters identified are completely fictitious. However, the subject matter, the conduct of the professional arbitral actors (the lawyers and arbitrators), and the reaction of the claimant closely approximate arbitrations this author attended as a summer law clerk for a nationally-recognized insurance company.

<sup>2</sup> See discussion *infra* Part II.D.

## CHALLENGING UNINSURED MOTORIST ARBITRATION PROCEDURES

UM coverage is intended to compensate insured, or covered, individuals<sup>3</sup> whose injuries arise from unidentified drivers<sup>4</sup> or drivers who have inadequate liability insurance coverage to pay for the damages.<sup>5</sup> National estimates indicate that between 5% and 25% of motorists do not carry any form of automobile insurance.<sup>6</sup> Currently, almost all states require insurance companies that sell automobile insurance policies to offer UM coverage to

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<sup>3</sup> ALAN I. WIDISS, *UNINSURED & UNDERINSURED MOTORIST INSURANCE* § 4.1 (2d ed. 2000). The term “insured” or “covered person” is commonly defined in the insurance policy describing which individuals are entitled to the coverage that the insurance company is obligated to afford. An insured is typically described in the policy as individuals identified in the declarations, their relatives or family members who occupy a covered or insured vehicle, and those persons who sustain damages because of an injury to the insured. *Id.*

Professor Widiss is considered to be the authority on UM insurance and this is substantiated by the number of times he has been cited in both judicial opinions and law review articles. A “terms and connectors” search on Westlaw of “Widiss” in the same sentence as “uninsured” and “motorist” (widiss /s uninsured & motorist) revealed that 574 judicial opinions from federal and state courts cited to Professor Widiss. This same search resulted in eighty-three legal periodicals citing to Professor Widiss. As a result, this Note will rely on Professor Widiss in many instances to clarify the cloudy world of UM insurance.

<sup>4</sup> 1 WIDISS, *supra* note 3, at 564. This term refers to where there is physical contact with a hit-and-run vehicle and where the identity of the owner or operator of the hit-and-run vehicle cannot be ascertained. *Id.*

<sup>5</sup> Michael J. Hanagan, *If you Lose, it is Binding, but if you Win—They Get a New Trial: Illinois Uninsured Motorist Arbitration*, 2005 J. DISP. RESOL. 93, 93 (2005) (arguing that the Illinois UM statute likely violates the federal and state constitutions for only allowing the insurance company to take a dispute to court and not the injured claimant seeking compensation). In order to clarify a typical UM situation, here is an example: X gets into an accident with Y. X is insured with a large insurance company and has UM coverage with a policy limit of \$50,000 per person or per accident. X has medical bills arising from the accident valued approximately at \$50,000. Y, the at-fault driver, has liability insurance coverage with per person or per accident policy limit of \$20,000. Thus, the value of X’s claim will exceed Y’s liability coverage, forcing X to seek UM benefits from X’s own insurer (at least in regards to the balance that the uninsured driver is unable to pay).

<sup>6</sup> Mark A. Saltzman, *Recent Development*, *Reed v. Farmers Insurance Group*, 15 OHIO ST. J. ON DISP. RESOL. 895, 895 (2000). As a result, if an insured driver is injured in an accident with one of these numerous individuals who are without any liability insurance, then the insured driver cannot recover damages from the at-fault uninsured individual. *See id.* Rather, the insured claimants must resort to seeking coverage directly from their own automobile insurance provider. *See id.*

combat the threat of being injured by an uninsured individual.<sup>7</sup> Many insurance customers have purchased UM coverage because numerous states passed laws that “require or strongly encourage” insurance companies to provide their insureds with such protection.<sup>8</sup> Accordingly, individuals who seek to enforce the protection of UM coverage must make a claim with their insurance provider, often times resulting in disputes over whether the policy covers the situation.<sup>9</sup>

Insurance companies prefer to resolve UM coverage disputes through arbitration rather than through litigation for several reasons. First, arbitrating a dispute results in a faster resolution than can be obtained through the court system.<sup>10</sup> Second, arbitration is less expensive than a court proceeding because of its expeditious manner in settling disputes, and because it avoids jury awards that tend to favor injured claimants over large insurance companies.<sup>11</sup> For these reasons, UM providers include in their policies a provision that mandates UM coverage dispute resolution through binding arbitration.<sup>12</sup> Because claimants are forced out of the court system and into arbitration through a “take-it-or-leave-it” contract, the process to recover UM benefits within a structure that the insurance companies create is unfair to claimants.<sup>13</sup>

Because arbitration does not provide the same procedural safeguards as a judicial proceeding,<sup>14</sup> a claimants’ right to procedural due process is

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<sup>7</sup> Hanagan, *supra* note 5, at 93. Another author described this recent trend as state law that “requires or encourages” insurance companies to provide UM coverage to its insured buying an automobile insurance policy. Gary T. Schwartz, *A Proposal for Tort Reform: Reformulating Uninsured Motorist Plans*, 48 OHIO ST. L. J. 419, 423 (1987) (noting that even in the states that only strongly encourage insurance companies to provide UM coverage, UM coverage is still widely purchased).

<sup>8</sup> Schwartz, *supra* note 7, at 423 (stating that in North Carolina, Nebraska, and Los Angeles County over ninety percent of drivers purchase UM coverage).

<sup>9</sup> See *infra* notes 18–25 and accompanying text.

<sup>10</sup> Steven A. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J. 78, 80 (1985) (arguing that the speed of obtaining a resolution is one of the most important benefits of arbitration, especially when compared to the many months that litigating a dispute in court normally takes).

<sup>11</sup> See *infra* notes 64–71 and accompanying text.

<sup>12</sup> See discussion *infra* Part II.C. The referenced section of the Note articulates specific characteristics of arbitration that are beneficial to institutional parties, like insurance companies. As a result of the benefits, insurance companies secure mandatory arbitration of disputes through pre-dispute clauses.

<sup>13</sup> See *infra* note 27–29 and accompanying text.

<sup>14</sup> See discussion *infra* Part IV.B–C. The referenced sections details how arbitrators, managing the arbitration based on unlimited discretion and the limited avenue for judicial

threatened when they attempt to enforce UM benefits. One common example that exposes the procedural unfairness found in the UM arbitration context is “dead air silence.”<sup>15</sup> Technically, dead air silence is the time elapsed between the end of a claimant’s response to a certain question and the insurance defense lawyer’s presentation of the next question.<sup>16</sup>

The use of dead air silence during UM arbitrations is just one example of the flaws present in the dispute resolution system that the insurance companies designed. In reality, the compelled arbitration system favors repeat institutional players, such as insurance companies, over inexperienced claimants who are unaware of the arbitral forum.<sup>17</sup> By agreeing to purchase UM coverage, insureds are forced to waive their right to procedural due process and instead present the dispute before an arbitrator rather than a jury.

Under the current UM arbitration system, the combination of arbitrators’ unlimited discretion in managing hearings, their persuasive business interest in future appointments, and their ability to produce an arbitral award that practically reflects the final resolution of the dispute precipitates the use of insurer-friendly techniques, such as dead air silence. Furthermore, because insured claimants are forced into arbitration through an adhesive insurance policy clause, the result is an effective displacement of in-court adjudication which makes it impossible to avoid resolving UM disputes through a process that is unilaterally designed by the insurer. As a result, the current dispute resolution system designed to handle UM coverage claims is inherently unfair and needs to be altered so that deserving claimants can receive their fair proportion of justice, and so that the public can confidently resort to the arbitration system.

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review, eliminate many of the procedural safeguards associated with a judicial proceeding.

<sup>15</sup> See discussion *infra* Part II.D. Dead air silence, which was demonstrated in the opening portion of the Note, is a common strategy used by insurance defense lawyers during arbitrations in which claimants seek to recover UM benefits from their insurers. The author has learned of this technique through UM arbitrations he attended as a summer clerk for an insurance company. The name of the company and the identity of the attorneys he worked for will remain anonymous throughout the Note.

<sup>16</sup> This is the author’s own definition for the dead air silence technique that insurance defense lawyers utilize in forcing the insured claimant to appear less credible or even partially blameworthy for the accident. Practitioners are likely to refer to this phenomenon in different terms, but most lawyers working for an insurance company that provides UM coverage understand what perpetual silence during an arbitration can do to an inexperienced claimant unaware of the technique.

<sup>17</sup> See *infra* notes 78–87 and accompanying text.

Part II of this Note will discuss the nature of UM coverage, common policy terms, and triggers that lead claimants into mandatory binding arbitration to resolve their disputes. It will also outline ethical issues that lawyers and arbitrators face in the UM context when conducting arbitrations. Part III describes constitutional rights afforded to individuals, including procedural safeguards implemented when a property interest is threatened to be taken away, equal protection of the laws among similarly situated people, and the right to present common law claims of negligence and damages before a jury. Part IV discusses specific characteristics of the UM arbitration system and how it deprives insured claimants of the constitutional rights outlined in the preceding section. Part V lists the realistic barriers that may prevent UM arbitrations from improving the procedural safeguards and rights of insured claimants. With the current framework of UM arbitrations detailed and the technical constraints acting as obstacles to significantly improving rights of claimants explained, Part VI prescribes adopting a due process protocol specifically governing UM arbitrations as a first step to solving the deficiencies of the insurer-created dispute resolution system.

## II. THE NATURE OF UM COVERAGE AND THE ARBITRATION SYSTEM USED TO RESOLVE DISPUTES

This section explores (1) the manner in which insured claimants are forced into the arbitral forum, (2) general characteristics of arbitration, (3) why insurance companies contractually guarantee the mandatory resort to arbitration, (4) how dead air silence operates within this insurer-designed system, and (5) how the current framework of UM arbitration causes professional arbitral actors to violate accepted rules of ethics. Because dead air silence can exist in the UM arbitration structure, the adverse effects on insured claimants combined with lawyers and arbitrators violating ethical obligations necessitates a change to the dispute resolution system.

### A. *Specific Aspects of UM Coverage*

UM coverage is the protection insured drivers receive from their insurance companies when injured in an accident with a driver who is unidentified or possesses inadequate insurance to cover the damages.<sup>18</sup> When

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<sup>18</sup> See, Hanagan *supra* note 5, at 93. The UM policy provisions make the insurer liable only conditioned upon the showing of negligence of a third party who is uninsured. 2 WIDISS, *supra* note 3, at 301. As a result, the insurer is only liable to the insured claimant in the event damages are shown to arise from the negligence of an uninsured

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the insured claimant seeks to enforce the UM policy terms, the individual is attempting to obtain recovery from the insurance company itself rather than from the at-fault driver who caused the damages to the insured claimant.<sup>19</sup> Naturally, the insurance company will seek ways to avoid or minimize paying the UM benefits to its insured.<sup>20</sup> As a result, an unavoidable conflict exists in the UM context wherein the insured tries to obtain compensation for the injuries and the insurance company tries to avoid paying for the losses.<sup>21</sup>

Within the UM policy, insurance companies include a clause to settle future disputes over UM benefits through mandatory binding arbitration between the insured claimant and the insurer.<sup>22</sup> Therefore, once the insured purchases UM coverage, the individual agrees in advance to resolve all disputes over UM benefits through binding arbitration.<sup>23</sup> Based on this scenario, it appears the insured waives the right to bring any disputes over UM coverage to court.<sup>24</sup> The typical agreement to arbitrate usually states that if the insured and insurer cannot agree as to whether the claimant is "legally entitled" to recover damages or as to the amount of damages, then the

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motorist driver. *Id.* Thus, if the insured claimant cannot establish fault of an uninsured third party, the insurer may not be legally obligated to provide coverage. *See id.* For example, language used in the UM policy specifies that the "[insurance] company will pay all sums which the insured . . . shall be legally entitled to recover as damages . . . because of bodily injury sustained by the insured, caused by [the use of an] uninsured highway vehicle." Schwartz, *supra* note 7, at 424–25 (footnote omitted).

<sup>19</sup> Hanagan, *supra* note 5, at 93.

<sup>20</sup> *Id.* at 99. This means that the insurance company will use techniques or interpret policy language in a manner that will limit the company's liability to its insured. *See id.* Although an insurance company is under a contract to extend the policy limits to a situation, the company will use all necessary measures to demonstrate that the particular situation is beyond the UM policy, and thereby is not covered. *See id.*

<sup>21</sup> *Id.*

<sup>22</sup> THE AM. ARBITRATION ASS'N, INSURANCE ADR MANUAL 104 (1993). The institutional author refers to these arbitration provisions as "future dispute resolution clauses." *Id.* Basically, the author claims that the parties contractually agree in advance to resolve disputes over receiving UM coverage through arbitration rather than resorting to courts. *See id.* Thus, an insured claimant is forced into arbitrating UM coverage disputes based on the policy language mandating arbitration. *See id.*

<sup>23</sup> *See id.*

<sup>24</sup> *See* 2 WIDISS, *supra* note 3, at 320–25. These agreements to arbitrate future disputes do not seem voluntary on the part of the insured, but rather a provision that must be accepted if the insured desires the protection from uninsured or unidentified drivers. *See id.* As a result, in order for the insured to receive UM coverage from the insurer, he or she must adhere to the arbitration provision regardless of whether the insured voluntarily elects to arbitrate a future dispute. *See id.*

disputed matter is to be resolved by arbitration.<sup>25</sup> Once the arbitration takes place and the arbitrator renders the award, a judicial proceeding is required to enforce the award.<sup>26</sup>

The main criticism against these “future dispute resolution clauses” is that they appear to create an adhesion contract wherein the insured accepts the arbitration provision on a “take-it-or-leave-it” basis.<sup>27</sup> In order to be protected from uninsured drivers, the insured must adhere to the arbitration-of-future-disputes provision, which effectively compromises a voluntary agreement to arbitrate.<sup>28</sup> Because the insured is not truly choosing the arbitral forum, the bargaining power heavily favors the insurer to create an advantageous dispute resolution system for the insurer and impose that system on the insured claimant.<sup>29</sup>

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<sup>25</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 206 (describing the usual language that insurance companies place in the policy as an agreement to resolve future disputes through mandatory binding arbitration). Another example of an agreement to arbitrate is:

If the insured (or the insured's legal representative) and the insurance company do not agree on (a) whether a claimant is legally entitled to recover damages from the owner or operator of an uninsured motor vehicle or (b) on the amount of such damages, the disputed matter *is to be* resolved by arbitration.

<sup>26</sup> 2 WIDISS, *supra* note 3, at 297 (emphasis added). The phrase “is to be” explicitly mandates that all disputes are to be resolved through an arbitration system, leaving no other alternative to obtain disputed UM benefits. *See id.*

<sup>27</sup> 2 WIDISS, *supra* note 3, at 481.

<sup>28</sup> *See* David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 55 (1997). The article defines an adhesion contract as a (1) standardized form document, (2) drafted by one party which (3) participates in numerous similar transactions and (4) presents the form to the other on a take-it-or-leave-it basis, (5) the adhering party enters into few of the transactions in question, and (6) the adhering party signs the form. *Id.* This definition seems to fit the UM future dispute resolution provisions where the insured must accept to arbitrate disputes if the insured is to have the protection of UM coverage. *See id.*

<sup>29</sup> *See id.* Professor Schwartz states that if the arbitration provision is on a take-it-or-leave-it basis, then the individual does not voluntarily agree to arbitrate disputes. *See id.* at 69. In fact, the individual is forced to resort to this dispute resolution system if he or she is to obtain UM coverage. *See id.*

<sup>29</sup> 2 WIDISS, *supra* note 3, at 321 (stating that the insured has no real bargaining power to specify the terms or provisions of the policy, which includes the mandatory arbitration clause); Schwartz, *supra* note 27, at 69 (arguing that the insured claimant and the insurer have disparate bargaining power because the insurer, which is the drafting party, can impose the arbitration clause on a take-it-or-leave-it basis); Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 HARV. J. ON LEGIS. 281, 284



Insurance companies utilize mandatory binding arbitration in their UM policies precisely because of the disparities it creates between the parties and the numerous advantages that the arbitral forum provides for the institutional "repeat player."<sup>30</sup> However, compelling arbitration of disputes in the UM context presents many problems. First, the insured claimant seems to be forced into arbitration without voluntarily consenting to settle the issue outside of court.<sup>31</sup> Second, the mandatory nature of arbitration eliminates the procedural safeguards that are found in court, such as the right to appeal a decision, successfully object to improper questions, or challenge the verdict before a final judgment.<sup>32</sup> Finally, compelled arbitration has been described as "unfair" and "tainted" because the insurer designs the arbitration system to its advantage and inflicts it upon the insured without any alternatives.<sup>33</sup>

### *B. The General Characteristics of Arbitration*

Arbitration is considered an alternate adjudicative process where a designated neutral person, or a panel of neutral persons, conducts hearings and considers evidence to resolve the matter in dispute.<sup>34</sup> The decision is rendered in the form of an award after all of the testimony and evidence relevant to the controversy is considered.<sup>35</sup> This award is likely to be binding

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(2002) (contending that mandatory binding arbitration clauses must be changed because the bargaining powers are unequal between the adherent and the drafter).

<sup>30</sup> Alan S. Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 524 (1997). Insurance companies are considered institutional repeat players because they frequently appear in arbitrations against their insured. *See id.* at 524–25. This term is meant to convey a relative component. Relative to insured claimants, who likely will only appear in a handful of arbitrations, insurance companies are considered the repeat players. As a result of this accumulated expertise and experience, insurers are more knowledgeable about the arbitration system as opposed to the insured.

<sup>31</sup> 2 WIDISS, *supra* note 3, at 323.

<sup>32</sup> *See* discussion *infra* Part IV.B–C.

<sup>33</sup> Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1671 (arguing that mandatory arbitration is unfair, but even if fair, the process is tainted to force another party to forgo the traditional form of dispute resolution, which society ordains as litigation).

<sup>34</sup> Jack M. Sabatino, *ADR as "Litigation Lite": Procedural and Evidentiary Norms Embedded Within Alternative Dispute Resolution*, 47 EMORY L.J. 1289, 1290–96 (1998) (discussing how arbitration is really a "lite" version of traditional litigation similar to how "lite" food products are just smaller versions of the original food product). Extending this analogy, arbitration would be the equivalent of Diet Coke for having substantially the same elements of a court proceeding but without all the unwanted calories.

<sup>35</sup> *Id.* at 1296.

upon the parties if the decision to arbitrate was invoked on a mandatory basis, usually pursuant to a contractual agreement to arbitrate.<sup>36</sup> Under this characterization, a UM arbitral award would be binding because of the policy provision mandating arbitration of future disputes regarding the allocation of UM benefits.<sup>37</sup>

Following its recent growth, arbitration has been commonly described as a speedy, efficient, and advantageous method of dispute resolution.<sup>38</sup> By requiring the future resolution of UM disputes through arbitration, the insured and insurer can obtain a resolution to the dispute within weeks or months after making the request for arbitration.<sup>39</sup> This speedy characteristic of arbitration is attributed to the flexibility afforded to arbitrators in managing the hearing regardless of whether the procedures conform to legal principles.<sup>40</sup> Despite arbitrators' full discretion to administer the arbitration process, they are constrained by the requirement of being fair to both parties.<sup>41</sup>

Before an arbitration award becomes effective, a court must enforce, modify, or vacate the award.<sup>42</sup> Therefore, a judicial proceeding is necessary in order for an arbitration award to become final and binding upon the parties.<sup>43</sup> Enactment of the Federal Arbitration Act (FAA)<sup>44</sup> and the Uniform Arbitration Act (UAA)<sup>45</sup> has resulted in fewer awards being vacated at the judicial proceeding stage.<sup>46</sup> Under the FAA, courts are required to enforce

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<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> 2 WIDISS, *supra* note 3, at 515; David E. Robbins, *Calling All Arbitrators: Reclaim Control of the Arbitration Process—The Courts Let You*, 60 DISP. RESOL. J., Feb–Apr. 2005, at 9 (arguing that arbitrators' awards will rarely be overturned and therefore arbitrators should manage the process without fear of having their awards vacated).

<sup>39</sup> 2 WIDISS, *supra* note 3, at 518.

<sup>40</sup> See *id.* at 519.

<sup>41</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 5.

<sup>42</sup> See 2 WIDISS, *supra* note 3, at 481. According to the author, affirming or vacating an arbitration award necessarily requires a judicial proceeding. *Id.* With arbitrators effectively acting as the final judge of applying law to facts, the award will not be vacated just because the arbitrator made a mistake or even several mistakes. *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 9 U.S.C. § 1 (2000 & Supp. 2006).

<sup>45</sup> UNIF. ARBITRATION ACT § 1, 7 U.L.A. 1 (1955).

<sup>46</sup> See Robbins, *supra* note 38, at 10–11 (describing how the FAA and the UAA establishes difficult standards to vacate an arbitral award during the judicial proceeding,

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arbitration clauses that affect commerce as if the private agreements are like any other contract.<sup>47</sup> Additionally, the UAA, which has been adopted by thirty-five states, also makes private arbitration agreements valid.<sup>48</sup> Even though the UAA does not eliminate the jurisdiction of state and federal courts, the courts must adhere to a certain “hands-off” period during which they cannot interfere with the arbitration.<sup>49</sup> As a result of the FAA and UAA, there is a national policy to enforce arbitration agreements and the awards arbitration produces.<sup>50</sup> Therefore, UM arbitration awards are highly likely to be upheld by the judiciary because of the national policy favoring arbitration of disputes.<sup>51</sup>

There are several characteristics unique to arbitration when it is compared to the traditional form of litigation. First, courts tend to follow well established rigid rules about discovery and evidence.<sup>52</sup> In contrast, arbitration is far more flexible, giving the arbitrator full discretion to determine the

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and therefore creates a general public policy in favor of enforcing the arbitrator’s decision).

<sup>47</sup> This section of the FAA provides:

A written provision . . . or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000 & Supp. 2006).

<sup>48</sup> The relevant provision of the UAA, similar to the FAA, provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

7 U.L.A. at 6–7.

<sup>49</sup> *Henderson v. Herman*, 409 S.E.2d 739, 741–42 (N.C. Ct. App. 1991) (holding that once a court compels arbitration it undergoes a “hands-off” period where the court does not lose jurisdiction but then also cannot interfere with the arbitration proceeding).

<sup>50</sup> See Schwartz, *supra* note 27, at 81 (describing how the limited grounds on which arbitration clauses can be challenged under the FAA and UAA has created a national policy favoring arbitration).

<sup>51</sup> See *id.*

<sup>52</sup> THE AM. ARBITRATION ASS’N, *supra* note 22, at 57 (noting how judges are required to follow rules of procedure and evidence whereas arbitrators have unlimited flexibility to manage the arbitration process based on the needs of the parties).

manner in which the arbitration will proceed.<sup>53</sup> Second, arbitration devotes less time to discovery and offers a limited opportunity for appeal.<sup>54</sup> Finally, arbitration can set the floor and ceiling within which an award must fall, but a court of law cannot determine the judgment prior to the litigation.<sup>55</sup>

In addition to the aforementioned differences between arbitration and the judicial system, arbitrators and judges are also very different from each other in several ways.<sup>56</sup> First, arbitrators are usually selected by the parties to the dispute, while judges are either appointed by a governing body or elected by designated constituents.<sup>57</sup> Second, arbitrators are selected for a particular dispute, resulting in a lack of procedural continuity that is implicit in the judicial process.<sup>58</sup> A third distinction is that judges maintain a level of impartiality from the parties, while arbitrators might be closely connected to the particular industry and the parties themselves.<sup>59</sup> Finally, arbitrators, unlike judges, are largely unregulated by overarching legal principles and are not monitored by any sort of institution.<sup>60</sup>

For these reasons, insured claimants seeking UM benefits enter a completely different adjudicative forum than the traditional judicial process, and their rights are determined by a decisionmaker completely distinct from a judge.<sup>61</sup> As a result, the insured claimant loses many of the procedural safeguards afforded in the court system in the insurer-designed arbitration system. Most importantly, it is highly probable that insured claimants do not fully understand the difference between the two adjudicative forums or that arbitration provides the only avenue to resolve UM disputes.<sup>62</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Henry Gabriel & Anjanette H. Raymond, *Ethics for Commercial Arbitrators: Basic Principles and Emerging Standards*, 5 WYO. L. REV. 453, 454–55 (2005) (showing that arbitrators are not judges based on the inherent differences between the two actors; therefore, arbitrators need not follow the same ethical principles judges are obligated to maintain).

<sup>57</sup> *Id.* at 454.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 454–55.

<sup>60</sup> *Id.* at 456.

<sup>61</sup> *See id.* at 454–56.

<sup>62</sup> 2 WIDISS, *supra* note 3, at 322–23 (describing how the UM arbitration provision is placed outside an individual's range of focus, which likely makes the individual unaware of the arbitration requirement until a dispute develops).

### C. *Why Insurance Companies Prefer Arbitration for Adjudicating Disputes over UM Coverage*

Insurance companies have a long history of resorting to arbitration to settle UM disputes, making arbitration the predominant method for insured drivers to receive UM benefits from their insurer.<sup>63</sup> This arbitration preference used to resolve disputes arising from the UM policy is best explained by the advantages that insurance companies receive from arbitration.

As a result of arbitrating all of the disputes arising from the UM policy, insurance companies lower their costs by limiting the extension of UM benefits while reducing the delays associated with litigation.<sup>64</sup> Thus, the lower systemic costs of arbitration and its quick resolution of disputes attract large industries, like the insurance industry, to choose arbitration over litigation.<sup>65</sup>

Another reason insurance companies choose arbitration to settle disputes over UM coverage is to avoid public jury trials.<sup>66</sup> Arbitration exchanges the jury that represents the respective community for individuals who are accustomed to the specific business or industry.<sup>67</sup> As a result, insurance companies hope that arbitrators will render what they consider to be

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<sup>63</sup> *Id.* at 69, 103; Saltzman, *supra* note 6, at 896 (arguing that the modern trend of arbitrating all disputes arising from the UM policy has not only displaced the judiciary, but that the mandatory arbitration clause has also created a new source of controversy between the insured and the insurer).

<sup>64</sup> See THE AM. ARBITRATION ASS'N, *supra* note 22, at 56; Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J.L. & PUB. POL'Y 581, 585 (2004) (stating that the risk perspective of delays and increased costs associated with litigation is eliminated when corporate defendants adjudicate all disputes through mandatory binding arbitration). The reduction in costs comes with the flexible approach in arbitration that does not follow the rigid rules of the judicial system. See Colvin, *supra* note 64, at 585. As a result, attorney fees will be less, filing costs will be less, and costs associated with discovery and pre-trial motions will be significantly less. See *id.* In addition, because arbitration reaches a disposition quicker than litigation in courts, the insurance company will only be disabled for a short period of time. See *id.* This means the distraction and the long-lasting characteristics of public trials are avoided by insurance companies.

<sup>65</sup> See Colvin, *supra* note 64, at 585.

<sup>66</sup> *Id.*

<sup>67</sup> See *id.*

reasonable arbitral awards that are within the policy limits,<sup>68</sup> thereby lowering the costs for insurance companies.<sup>69</sup> Because some juries view insurance companies as “deep pocket” defendants, arbitration avoids the risk of large jury verdicts which reward individuals and are against what is perceived to be the rich insurance industry.<sup>70</sup> Moreover, data comparing jury and arbitral awards reveals that both the mean and median value of awards are lower for arbitration.<sup>71</sup> Thus, insurance companies prefer resolving UM disputes through arbitration to avoid public juries and reduce their legal exposure to insured claimants seeking UM benefits.<sup>72</sup>

There are numerous other reasons that drive insurance companies to mandate arbitration for determining whether UM coverage exists. Because arbitration is unlikely to produce a large award for the insured, the prevailing plaintiff’s attorney fees, which the insurer pays pursuant to statutes, will be less, thereby reducing the insurance companies’ potential expense.<sup>73</sup> Additionally, arbitrations are private proceedings.<sup>74</sup> As a result, public perception does not damage the reputation of insurance companies because arbitration eliminates the public’s involvement in arbitral proceedings.<sup>75</sup> Finally, the limited role of discovery skews the arbitration system in favor of the insurance company because the claimant has the burden of producing

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<sup>68</sup> 2 WIDISS, *supra* note 3, at 522 (stating that arbitrators from the field in which the dispute exists are more likely to render a reasonable award within the policy limits than a jury that has no expertise in the area).

<sup>69</sup> See *infra* text accompanying notes 71–74.

<sup>70</sup> Hanagan, *supra* note 5, at 99 (stating that juries commonly view insurers as companies with “deep pockets” that can afford to pay individuals seeking relief whether or not the individual is really entitled to recover insurance proceeds). Because insurance companies are thought to have plentiful financial resources, juries attach less sympathy to insurance companies relative to the injured claimants. See *id.* Thus, injured claimants typically end up as the victor in public jury trials. See *id.*

<sup>71</sup> Schwartz, *supra* note 27, at 65. The study described the median arbitration award as \$49,400, versus the median jury verdict of \$264,700. *Id.* In addition, the mean arbitration award was also lower at \$124,500, versus the mean jury verdict of \$703,600. *Id.* Although the data reflects just a sample, it does reveal a general trend that arbitral awards are significantly less than jury verdicts. As a result, insurance companies prefer resorting to arbitration as a method to reduce their costs in the numerous claims filed against them.

<sup>72</sup> See *id.*; Hanagan, *supra* note 5, at 99.

<sup>73</sup> Schwartz, *supra* note 27, at 60.

<sup>74</sup> *Id.* at 61. This means that papers filed with arbitrators are not part of the public record, proceedings do not take place in public courtrooms, and the subject matter of UM arbitrations are not publicized because it seems to be less interesting to the media. *Id.*

<sup>75</sup> *Id.*

evidence that is likely in the possession of the insurer.<sup>76</sup> These three reasons, which include lower plaintiff attorney fees, lack of public exposure, and limited discovery, lead insurance companies to choose arbitration to resolve disputes arising from UM policies.

Based on the aforementioned attributes, it is logical for insurance companies to lock in the advantages of arbitration in advance of any disputes through mandatory arbitration clauses in the UM policy. Because of the consistent advantages of arbitration for the insurance companies and the adhesive nature of the clause, it is unlikely that the insured claimant can avoid the arbitral forum to resolve disputes over UM coverage. Thus, moving towards an arbitration system that provides greater fairness to the small players, such as the insured individual, can enhance the reputation of arbitration and increase public confidence in the arbitration dispute resolution system.

### *D. The Dead Air Silence Phenomenon in UM Arbitration*

Dead air silence occurs in the time that elapses between when claimants finish their response to a question and when the insurance defense lawyer presents a subsequent question.<sup>77</sup> After insured claimants finish a response to a question, the defense lawyer silently waits while looking through evidentiary materials before presenting a follow-up question. As the prolonged silence continues, the tension builds,<sup>78</sup> likely causing claimants or witnesses to elaborate on their previous response.<sup>79</sup> Unfortunately, such

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<sup>76</sup> *Id.*

<sup>77</sup> This definition is the author's characterization of the technique that insurance defense lawyers utilize to obtain favorable pecuniary results for the lawyer's respective insurance company. Regardless of how one conceptualizes the technique, the main object is to use silence in an arbitration proceeding to intimidate the claimant and make the claimant feel uncomfortable about the response previously given.

<sup>78</sup> One of the author's supervising attorneys informed him that the silence causes a tension, which results in the insured not feeling credible in the eyes of the insurance defense lawyer and finding the need to talk more to obtain a greater degree of credibility.

<sup>79</sup> Based on this author's understanding, the inexperienced claimant feels a need to eliminate the tension that silence presents by elaborating on the previous answer. According to an insurance defense lawyer, the extensive period of silence most likely makes the claimant feel like the previous response was inadequate or untrustworthy and forces the claimant to try to clarify the matter. As the claimant provides more details about the accident, inconsistencies as to the facts (how fast the insured driver was going, what actions the insured driver took, the weather conditions, the actions of the uninsured driver) can occur. It is this inconsistency in the testimony that the insurance defense lawyer aims to illustrate to the arbitrator. Because the arbitrator places appropriate weight

continued responses often present inconsistencies in the testimony.<sup>80</sup> Because the arbitrator has the authority to weigh the significance of each evidentiary item, a claimant's testimony that is incoherent or inconsistent due to unnecessary elaboration will appear less credible and thereby adversely affect the arbitral award.<sup>81</sup>

The claimant's lawyer can object to the use of dead air silence, but the arbitrator will usually allow the testimony to continue over the objection of the party opposing the line of questioning.<sup>82</sup> Accordingly, even with the claimant's counsel's objection to every passing second of silence, any such objection is highly unlikely to terminate the dead air and cure the increasingly tense environment.<sup>83</sup> In addition to the fact that objections are rarely sustained, the arbitrator's future business interest also exacerbates the situation in allowing this commonly-used insurance defense tactic.<sup>84</sup> The arbitrator has an interest in being appointed again for any future arbitration.<sup>85</sup> With the insurance company representing the repeat player in the situation, the decisions that the arbitrator makes are likely to favor the institutional

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on evidence, a testimony that is incoherent will be appraised less weight by the arbitrator and will undoubtedly affect the binding arbitration award. *See* 2 WIDISS, *supra* note 3, at 458.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 456–57. Arbitrators are entitled to give appropriate weight to evidence after hearing all objections. *Id.* This shows how dead air silence can adversely affect the insured's arbitral award for producing an inconsistent testimony not worthy of much weight. *See id.*

<sup>82</sup> *Id.* at 458. This common phenomenon of not sustaining objections occurs because the arbitrator needs to hear and perceive everything that will help him or her decide the case properly. *Id.* As a result, many objections will not be sustained and the testimony will be permitted to continue despite the opposing counsel's displeasure. *See id.* Because arbitrators do not require the same level of protection as juries, they will allow testimonies to continue over clearly audible objections. *See id.*

<sup>83</sup> For example, in one of the arbitrations this author attended, the claimant's counsel continuously objected to the insurance defense attorney's use of dead air silence. However, the arbitrator repeatedly mentioned that this was arbitration, not subject to the same rules found in court. The claimant continued her response to the previous question and created an inconsistency in the injuries received. As a result, the claimant received only half of her medical expenses incurred, which represented about 30% of the policy limits.

<sup>84</sup> Rau, *supra* note 30, at 521–23 (arguing that the structural bias present in the UM arbitration system where arbitrators are trying to obtain future business opportunities from the institutional repeat player is a major criticism of such a dispute resolution system).

<sup>85</sup> *Id.*



party.<sup>86</sup> Thus, the arbitrator's future business interest will also have an impact on permitting the dead air silence to continue despite its serious disadvantages for the claimant.<sup>87</sup> Most importantly, the arbitral award is final, with narrow exceptions for judicial review.<sup>88</sup> Therefore, claimants who receive a lower award because they were victims of dead air silence cannot appeal to a state or federal court to vacate the arbitral award.<sup>89</sup> Because arbitral awards are not subject to expansive judicial review and objections are rarely sustained,<sup>90</sup> the arbitrator may exercise bias that favors insurance companies, which makes dead air silence a substantial threat to an individual's right to procedural due process in enforcing UM policies.<sup>91</sup>

### *E. Ethical Boundaries in Arbitration Dealing With UM Coverage Issues*

In general, the ethical obligations of all arbitral actors, including arbitrators, in-house insurance defense lawyers, and counsel representing the insured, are comparable to the rules of ethics governing courts.<sup>92</sup> The ethical principles to which arbitral actors should adhere include acting honestly, professionally, and with integrity in every aspect of the arbitration.<sup>93</sup> Additionally, lawyers and arbitrators are under an obligation to "uphold the integrity and fairness of the arbitration process."<sup>94</sup>

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<sup>86</sup> *Id.* at 524–25.

<sup>87</sup> *See id.* at 521–25.

<sup>88</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 5.

<sup>89</sup> *See id.*

<sup>90</sup> *Id.*

<sup>91</sup> *See* Rau, *supra* note 30, at 521–25.

<sup>92</sup> *See* Gabriel & Raymond, *supra* note 56, at 455. Although the traditional rules of ethics act as a model, strict adherence by arbitral actors is not necessary because arbitration is not the equivalent of a proceeding undertaken in a court of law. *Id.* Additionally, arbitrators are completely distinct from judges and need not follow the same ethical principles by which judicial actors are bound. *Id.*

<sup>93</sup> O.S.B.A. C.L.E. REFERENCE MANUAL VOLUME NO. 04-10, INSURANCE DEFENSE—ETHICS AND BEST PRACTICES § 2.12 (2004). This source is a continuing legal education pamphlet on the ethical concerns surrounding insurance defense lawyers and insurance companies in their conduct during arbitrations and other forms of dispute resolution.

<sup>94</sup> Gabriel & Raymond, *supra* note 56, at 458; *see, e.g.*, AM. ARBITRATION ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES (2002), available at <http://www.adr.org/sp.asp?id=21958>. The relevant provision provides:

Applying these general rules, UM arbitration proceedings and the use of dead air silence may be considered ethical violations on the part of insurance defense lawyers in that they are not acting with integrity.<sup>95</sup> Additionally, by permitting the continued use of dead air silence over the objection of the claimant's counsel, the arbitrator fails to uphold the "integrity and fairness of the [arbitration] process."<sup>96</sup> Given such ethical infractions, insured claimants would be hesitant to resolve their UM coverage disputes in an arbitral forum. Because the use of mandatory binding arbitration clauses in the UM policy makes arbitration unavoidable, the dispute resolution system itself must be changed.

Analysis of the specific ethical obligations of the insurer, insurance defense lawyers, and arbitrators during UM arbitration, reveals that using dead air silence against an insured causes numerous ethical violations. If the public is to have confidence in resorting to arbitration as an effective dispute resolution system, then the insurer-designed structure needs to change so that arbitral actors can adhere to accepted ethical principles and produce fair awards.

### *1. Ethical Norms for the Insurer and the Lawyers in UM Arbitration*

The insurer, the insurance defense attorney, and the claimant's counsel should all abide by ethical considerations to enhance the reputation of arbitration as an effective forum for resolving UM coverage disputes. Insurers (such as All State, State Farm, Nationwide, and American Family) have an obligation to act in good faith and in a fair manner with their

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An arbitrator has a responsibility not only to the parties but also to the process of arbitration itself, and must observe high standards of conduct so that the integrity and fairness of the process will be preserved. Accordingly, an arbitrator should recognize a responsibility to the public, to the parties whose rights will be decided, and to all other participants in the proceeding . . . . Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, public clamor, and fear of criticism or self-interest. They should avoid conduct and statements that give the appearance of partiality toward or against any party.

AM. ARBITRATION ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES Canon 1, available at <http://www.adr.org/sp.asp?id=21958>.

<sup>95</sup> O.S.B.A. C.L.E. REFERENCE MANUAL VOLUME NO. 04-10 *supra* note 93, § 2.12.

<sup>96</sup> *Id.*

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insured.<sup>97</sup> This duty to act fairly and in good faith should also extend to situations in which the insurer and the insured are arbitrating over UM coverage.<sup>98</sup> Based on this concept, the current state of UM arbitration and the use of the dead air silence technique come in direct conflict with the insurer's ethical obligations. First, the agreement to arbitrate cannot be considered a good faith action on the part of the insurer because it is unlikely that the insurer will fully explain the implications of such a clause to the insured.<sup>99</sup> Second, intentionally using dead air silence to create inconsistencies in the insured claimant's testimony cannot be considered fair in any sense; especially since the insurer understands that any forthcoming objections to the technique will not be sustained and the arbitrator will give less weight to any resulting inconsistencies.<sup>100</sup> As a result, both the mandatory nature of the arbitration, and the use of dead air silence to minimize the UM coverage afforded to the insured, violate the insurer's ethical obligation.<sup>101</sup>

Insurance defense lawyers' common conduct during UM arbitration also results in potential ethical infractions. The principal rule of ethics for insurance defense lawyers is to exercise independent professional judgment throughout the dispute resolution proceeding.<sup>102</sup> Under this rationale, insurance defense lawyers are ethically required to uphold their independent professional judgment over their personal interest or influence by others.<sup>103</sup> Accordingly, insurance defense lawyers commit ethical violations when they

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<sup>97</sup> O.S.B.A. C.L.E. REFERENCE MANUAL VOLUME NO. 04-10, *supra* note 93, at § 1.3. An insurance company's requirement of acting in good faith with its insured is defined as being faithful to its duty or obligation, and this duty is determined by analyzing the responsibilities agreed to by the insurer in the written contract. *Int'l Bhd. of Elec. Workers, AFL-CIO v. Hechler*, 481 U.S. 851, 858-59 (1987); *Humana Inc. v. Forsyth*, 525 U.S. 299, 312 (1999) (holding that insurers are under a common law duty to negotiate with their insureds in good faith and to deal with them fairly); *Hoskins v. Aetna Life Ins. Co.*, 452 N.E.2d 1315, 1319 (Ohio 1983) (concluding that in a relationship between the insurer and the insured, an insurer has the duty to act in good faith in the handling or the payment of the insured's claims, and thereby a lack of good faith results in a cause of action in tort). The insurer breaching this duty of good faith entails a dishonest purpose, moral obliquity, or conscious wrongdoing and encompasses more than bad judgment or negligence. *Hoskins*, 452 N.E.2d at 1320.

<sup>98</sup> See O.S.B.A. C.L.E. REFERENCE MANUAL VOLUME NO. 04-10, *supra* note 93, § 1.3.

<sup>99</sup> See *infra* notes 169-73 and accompanying text.

<sup>100</sup> See 2 WIDISS, *supra* note 3, at 456-58.

<sup>101</sup> See O.S.B.A. C.L.E. REFERENCE MANUAL VOLUME NO. 04-10, *supra* note 93, § 1.3.

<sup>102</sup> *Id.* § 2.11.

<sup>103</sup> *Id.* § 3.24.

use dead air silence to limit UM coverage and harass insured claimants.<sup>104</sup> Experienced lawyers understand the effects of using dead air against inexperienced claimants and the likely adverse effects it will have on arbitral awards.<sup>105</sup> However, the insurer's desire to limit its legal liability, combined with the pressures an employer imposes on its employee, both precipitate the continued use of dead air silence. As a result, insurance defense lawyers compromise their independent professional judgment for the sake of pleasing their employers, and thereby violate their requisite ethical obligations.<sup>106</sup>

## 2. Ethical Boundaries for Arbitrators

Similarly to insurance defense lawyers and insurers, arbitrators must also adhere to ethics in order to preserve the public's confidence in the arbitration system. The first rule of ethics for arbitrators is to conduct the arbitration proceeding in a manner that is fair to both the claimant and the insurer.<sup>107</sup> Although an arbitrator has full discretion in managing the arbitration, the procedures must provide the parties with a fair hearing.<sup>108</sup> The benchmarks of fundamental fairness are considered to be met when an impartial arbitrator provides the parties with an opportunity to make their arguments and offer evidence in order to enable the arbitrator to make an informed decision about the UM coverage dispute.<sup>109</sup>

Using the dead air silence technique in the UM arbitration context violates arbitrators' ethical obligation to ensure the fairness of the hearing for both parties.<sup>110</sup> The fundamental unfairness is present when the arbitrator permits the use of dead air silence to continue over the objection of the claimant's counsel. An arbitrator rarely sustains objections because the need to protect a vulnerable jury is non-existent.<sup>111</sup> As a result, the arbitrator's

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<sup>104</sup> *Id.*

<sup>105</sup> See *supra* note 16 and accompanying text.

<sup>106</sup> A.B.A. MODEL CODE OF PROF'L RESPONSIBILITY Canon 5: A Lawyer Should Exercise Independent Professional Judgment on Behalf of his Client (2002), available at <http://www.abanet.org/cpr/mrpc/mcpr.pdf> (stating that "the professional judgment of a lawyer should be exercised . . . free of compromising influences and loyalties").

<sup>107</sup> AM. ARBITRATION ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 94, at Canon I.A. The relevant provision states: "Arbitrators should conduct themselves in a way that is fair to all parties." *Id.* at Canon I.D.

<sup>108</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 5; Robbins, *supra* note 38, at 10.

<sup>109</sup> See Robbins, *supra* note 38, at 10.

<sup>110</sup> AM. ARBITRATION ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 94, at Canon I.D.

<sup>111</sup> See 2 WIDISS, *supra* note 3, at 458.

general procedures permit the use of dead air silence to create inconsistencies in the claimant's response despite the multiple audible objections the claimant's lawyer is likely to raise.<sup>112</sup> Such a practice is obviously skewed in favor of the insurer, the repeat player in the arbitration setting, because the same technique cannot be used with success against the insurer.<sup>113</sup> Thus dead air silence results in arbitrators failing to provide a fair hearing, and thereby leads to the arbitrator violating a rule of ethics. Accordingly, the balance of fairness is tipped in this UM arbitration system, favoring the insurer over the claimant.

The second ethical obligation for arbitrators is to appear and remain impartial toward both parties throughout the arbitration.<sup>114</sup> An arbitrator has a duty of impartiality with all dealings of the arbitration and must disclose to the parties any relations that may create the appearance of partiality.<sup>115</sup> Thus, an arbitrator cannot be biased in favor of, or prejudiced against, any party, and must also not have close personal or professional relationships with any of the parties.<sup>116</sup> As a result, the main ethical boundary for an arbitrator is to refrain from participating in any role other than that of an impartial decisionmaker.<sup>117</sup>

However, the arbitrator's duty of impartiality is implicitly impaired by the subconscious interest of being appointed as the arbitrator in future

<sup>112</sup> *See id.*

<sup>113</sup> The claimant's counsel cannot use dead air effectively against the insurer who is likely being represented at the arbitration by the insurance defense lawyer. The strategy simply would not work against the defense lawyer, who knows how to defeat it—by simply not talking unless a question is presented. Although client counseling may inform insured claimants on how to defeat dead air, this Note does not attempt to prescribe the actions individuals should take. Instead, the focus of this Note is to alter the arbitration system so that human judgment does not determine the proportion of justice the insured claimant is to receive from the hearing.

<sup>114</sup> AM. ARBITRATION ASS'N CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, *supra* note 94. The relevant provision states: "After accepting appointment and while serving as an arbitrator, a person should avoid entering into any business, professional, or personal relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality." *Id.* at Canon I.C.

<sup>115</sup> Gabriel & Raymond, *supra* note 56, at 457; *See* 2 WIDISS, *supra* note 3, at 346.

<sup>116</sup> Gabriel & Raymond, *supra* note 56, at 457. The referenced section of the article describes what constitutes an independent and an impartial arbitrator, which is required by most national arbitration laws. *Id.* at 458. Implicitly then, a UM arbitrator's appearance of impartiality would be defeated when a subconscious financial interest in repeat business is taken into consideration. *See id.*

<sup>117</sup> *Id.* at 464.

arbitrations.<sup>118</sup> The “repeat provider” problem describes arbitrators as having a financial incentive to ensure that the institution is pleased with the results of the arbitration so that the institution will appoint the same individual in the future.<sup>119</sup> The best method of securing the future appointment is to guarantee that the company that is likely to be a repeat participant in other arbitrations is satisfied with the present proceeding, which usually means obtaining a favorable outcome for the insurance company.<sup>120</sup> This phenomenon creates a structural bias in favor of the large companies that frequently arbitrate disputes. With this bias, arbitrators are likely to consider the award that they render will have an impact on their acceptability and the probability of being appointed again.<sup>121</sup> Even if the arbitrator acts with and provides the appearance of impartiality, the economic interest in repeat business creates an inherent conflict of interest that works in favor of the company over the individual party.<sup>122</sup> Consequently, an arbitrator’s actions in UM arbitration are unfairly slanted to please the insurance company with the hope of being appointed again in future UM arbitration. Therefore, an insurance defense lawyer’s use of dead air silence is likely to be permitted to make certain that the insurance company is satisfied with the arbitration experience.

Because an arbitrator deciding a dispute over UM coverage is likely to violate the duty of impartiality with this inherent business interest in satisfying the insurer,<sup>123</sup> a change in the structure of UM arbitration is

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<sup>118</sup> See Rau, *supra* note 30, at 521–22.

<sup>119</sup> Sternlight, *supra* note 33, at 1650. The author refers to arbitration service providers being in competition with each other in obtaining future appointments by companies that frequently resolve disputes through arbitrations. *Id.* As a result, the author notes that service providers consciously, or subconsciously, slant the result in the companies’ favor to secure this future appointment and edge out their competition. *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Rau, *supra* note 30, at 521–22 (arguing that the structural bias of arbitrators’ self-interest of future arbitral appointments is the most troubling aspect of mandatory binding arbitrations).

<sup>122</sup> See Lewis Maltby, *Paradise Lost—How the Gilmer Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.L. SCH. J. HUM. RTS. 1, 11–12 (1994) (outlining the minimal levels of due process needed in arbitrations in order for arbitration to become a reasonable alternative to litigation). The author argues that some aspects within the arbitration, such as the arbitrator’s interest for repeat business, make it difficult for all parties to have an equal chance for success. See *id.* at 3–4. Therefore, the author concludes that the *Gilmer* Court may have created a national policy in favor of arbitrating disputes, but the Court missed the opportunity to define what process is due in arbitration so that parties to the arbitration have an equal chance of obtaining a successful result. *Id.* at 27–29.

<sup>123</sup> Rau, *supra* note 30, at 521–22.

necessary. With UM disputes normally being resolved in the arbitral forum, society, and especially injured claimants, have an interest in ensuring that arbitration generates fair and reliable awards.<sup>124</sup> Thus, a system of behavior that governs arbitral participants is needed to create the fair and reliable awards that society expects from UM arbitration.<sup>125</sup> As a result, modifying the structure of UM arbitration so that arbitrators and lawyers can adhere to accepted ethical principals will enhance the confidence of insured claimants to arbitrate disputes and will assure the public that the adjudicative system works effectively.<sup>126</sup>

### III. WHAT PROCESS IS DUE?

Even though arbitration is an alternative adjudicative system, the public still retains an expectation that arbitration will ensure predictable, fair, and consistent interpretation of society's laws with procedural safeguards that mirror court proceedings.<sup>127</sup> In fact, infusing traditional due process norms can undeniably meet this expectation and influence the public's perception of the arbitration process.<sup>128</sup> Public trust in the dispute resolution system is enhanced by the addition of due process principles combined with the contemporaneous increase in the fairness and predictability of arbitrations.<sup>129</sup> In contrast, failure to apply due process standards in UM arbitration likely leads to both insured claimants receiving an inadequate proportion of justice<sup>130</sup> and an increase in public distrust of such an adjudicative practice. Accordingly, increasing the fairness of the arbitration process necessarily implicates incorporating due process protections.<sup>131</sup>

The first part of this section illustrates how the United States Supreme Court determines which procedural safeguards are constitutionally necessary

<sup>124</sup> See Gabriel & Raymond, *supra* note 56, at 470.

<sup>125</sup> See *id.*

<sup>126</sup> See *id.*

<sup>127</sup> See Sternlight, *supra* note 33, at 1662.

<sup>128</sup> Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 397 (2004) (arguing the benefits of placing due process requirements in various arbitration proceedings will increase the trust the public places in the arbitration process).

<sup>129</sup> Sternlight, *supra* note 33, at 1662.

<sup>130</sup> See Maltby, *supra* note 122, at 11 (concluding that procedural due process minimums are necessary if arbitration of disputes is to become a reasonable alternative to litigation).

<sup>131</sup> See Harding, *supra* note 128, at 395–97. As a result, improving the arbitration system entails infusing due process protections. See *id.*

in a particular situation. In addition to the Supreme Court's ruling, the second portion of this section outlines the minimal levels of due process that are considered essential to ensure a fair arbitration experience.

### *A. Due Process Requirements for an Adjudicative Proceeding*

In a landmark decision, the Supreme Court referred to procedural due process as the imposition of constraints on governmental actions that deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause.<sup>132</sup> According to the Court, the fundamental requirement of due process is the "opportunity to be heard 'at a meaningful time and in a meaningful manner.'"<sup>133</sup> However, the Court noted that "'due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."<sup>134</sup> Rather, due process is a flexible concept that "calls for such procedural protections as the particular situation demands."<sup>135</sup> All that is necessary is that the "procedures be tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard."<sup>136</sup>

Determining the constitutional adequacy of the procedures requires consideration of three distinct factors.<sup>137</sup> The first factor in finding whether procedural due process includes analysis of the private interests that will be affected by the action.<sup>138</sup> Following this, the second factor considers the risk of the erroneous deprivation of such interests through the procedures that are used and the probable value of additional or substitute procedural

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<sup>132</sup> *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976) (outlining the requirements of procedural due process and the main test in determining whether additional procedural safeguards are mandated before an individual's liberty or property interest can be constitutionally deprived). The case came to the Supreme Court on appeal because the appellate court held that terminating an individual's disability benefits without an evidentiary hearing deprived him of his procedural due process rights under the Constitution. *Id.* at 325–26. However, the Court reversed, holding that procedural due process does not require an evidentiary hearing prior to terminating disability benefits. *Id.* at 349. The decision rested upon applying three distinct factors that the Court articulated, which revealed that the private and governmental interests illustrated that the existing procedures afforded constitutionally sufficient procedural due process. *Id.* at 340.

<sup>133</sup> *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

<sup>134</sup> *Id.* at 334 (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)).

<sup>135</sup> *Id.* (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

<sup>136</sup> *Id.* at 349 (citation omitted).

<sup>137</sup> *Id.* at 335.

<sup>138</sup> *Mathews*, 424 U.S. at 335.



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safeguards.<sup>139</sup> Finally, the third part of the test considers the government's interest in the process, including the resulting fiscal and administrative burdens that additional or substitute procedural safeguards create.<sup>140</sup>

The Fourteenth Amendment due process requirements are satisfied "if the substitute remedy is substantial and efficient."<sup>141</sup> From this principle, arbitration qualifies as a constitutional substitute remedy that does not require procedural changes.<sup>142</sup> The arbitral award in most cases provides a substantial amount of justice to the parties, and the proceeding is an efficient means of settling the dispute.<sup>143</sup> This contention is substantiated by another Supreme Court decision that holds that arbitration is a procedurally fair alternative to litigation.<sup>144</sup> Therefore, arbitrating rather than litigating the dispute satisfies the requirements for procedural due process.<sup>145</sup> Despite passing the general constitutional threshold, arbitration must still impose due process minimums of its own in order to enhance the public trust and confidence in the arbitral forum.

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<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Reed v. Farmers Ins. Group*, 720 N.E.2d 1052, 1059 (Ill. 1999) (citing *Hardware Dealers Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 159 (1931) (holding that an escape clause allowing the insurer to appeal an arbitral award over a certain amount without affording the insured claimant the same right did not violate procedural due process); Hanagan, *supra* note 5, at 107. The *Reed* decision highlights the difficulty of making a successful constitutional attack on private arbitrations.

<sup>142</sup> *See Reed*, 720 N.E.2d at 1059.

<sup>143</sup> *See id.*; Matthew J. Clark, *The Legal and Ethical Implications of Pre-Dispute Agreements Between Attorneys and Clients to Arbitrate Fee Disputes*, 84 IOWA L. REV. 827, 864 (1999) (describing how arbitrating disputes over proper attorney fees is advantageous for providing both parties a shortcut to substantial justice); Robbins, *supra* note 38, at 9 (stating that the efficiency of arbitration arises from the cost-effective proceeding that is expeditious in resolving disputes between two conflicted parties).

<sup>144</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (upholding the district court decision to mandate arbitration of anti-trust claims because the agreement to arbitrate was valid under the Federal Arbitration Act); Schwartz, *supra* note 27, at 106 (clarifying the decision in *Mitsubishi* to be a conclusion that arbitration is outcome-neutral and represents a fair alternative to litigation).

<sup>145</sup> *See Reed*, 720 N.E.2d at 1059. Being successful on a constitutional attack on the procedural insufficiencies of private arbitrations is extremely difficult. *Id.* Therefore, with arbitrators rendering awards of substantial justice in an efficient proceeding, it is highly unlikely for arbitration to be subjected to a constitutional attack. *See id.*

## B. Due Process Principles in Arbitration

Due process concerns in arbitration arose after the Supreme Court held that private agreements to settle future disputes through arbitration, instead of litigation, are enforceable.<sup>146</sup> In order to assure fairness and public confidence in private arbitration, infusion of due process standards became a necessity.<sup>147</sup> Even though the Court allowed companies to introduce arbitration procedures in place of litigation, the Court has not determined the requisite structure for carrying out these procedures.<sup>148</sup> However, this lack of structure does not mean the Court would authorize arbitration to exist under any set of procedural rules.<sup>149</sup> Thus, because arbitration cannot proceed in any manner, uniform procedural norms will provide parties with an expectation as to how the dispute resolution system operates as well as a degree of protection through application of certain safeguards.

Beginning with the mandatory clauses wherein parties agree to resolve future disputes solely through binding arbitration, due process protections are needed to ensure certain procedural safeguards are included in the arbitral forum. The first additional procedural safeguard should be guaranteed access to courts for disputes over common law claims involving the determination of negligence and damages issues.<sup>150</sup> In addition, courts should only enforce

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<sup>146</sup> See generally *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (holding that age discrimination claim was subject to compulsory arbitration based on the private agreement to arbitrate all disputes arising from the employment context).

<sup>147</sup> Harding, *supra* note 128, at 394–95 (describing how establishing a fair arbitration process necessarily requires the implementation of due process minimums in order to enhance the credibility of the dispute resolution system).

<sup>148</sup> *Gilmer* 500 U.S. at 26 (concluding that statutory claims may be subject to arbitration under an enforceable private agreement and the question of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration). Although the Court in *Gilmer* determined that the minimal levels of discovery, the non-public characteristics of arbitration, inability to obtain effective appellate review, and lack of equitable remedies are not sufficient grounds to preclude arbitration pursuant to an enforceable agreement, the Court did not outline what procedures were necessary. *Id.* at 31–33. Additionally, an author of a law review article argues how the *Gilmer* Court only narrowly decided that private arbitration agreements are valid as a substitute for litigation rather than defining what procedures the arbitrator must follow. Colvin, *supra* note 64, at 593. Because of this void, arbitrators and arbitration service providers are free to adapt any type of procedure they wish. *Id.*

<sup>149</sup> Harding, *supra* note 128, at 392–93.

<sup>150</sup> See THE AM. ARBITRATION ASS'N, *supra* note 22, at 221. This means that the right to judicial review must be present if parties to an arbitration agreement are to be afforded with adequate due process. See *id.* At a minimum, then, due process would exist

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the mandatory arbitration provision when both parties consented to and made a voluntary commitment to arbitrate future disputes.<sup>151</sup> Accordingly, as a necessary procedural safeguard, the parties must actually agree to the mandatory arbitration clause rather than have the corporate defendant impose the dispute resolution system upon the adherent.<sup>152</sup> Furthermore, arbitration provisions should only be enforced if the procedures do not egregiously favor one side over another.<sup>153</sup> This demonstrates that access to courts, consensual agreements to arbitrate, and procedures that ensure a level playing field between the parties, are minimal procedural due process rights in arbitration.

In addition, specific measures and requirements are necessary to guarantee due process protections. To meet minimal standards in affording the parties due process, the arbitration proceeding must provide: (1) adequate and reasonable notice, (2) an impartial decisionmaker, (3) the opportunity to present evidence, (4) an opportunity to have witnesses testify under oath, (5) judicial review, and (6) the opportunity to have legal representation.<sup>154</sup> Most importantly, providing adequate due process protections would require that the arbitrator allow parties, especially the claimant, an opportunity to conduct discovery.<sup>155</sup> Allowing the claimant to conduct discovery is a significant procedural safeguard because corporate defendants frequently control the

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if parties were not obligated to waive their right to bring disputes over common law claims in court rather than being compelled to arbitrate them. *See id.* Even if there is compulsory arbitration based on a valid agreement, the parties should still retain the ability to have a court review the validity of the award and procedures utilized in the hearing. *See id.*

<sup>151</sup> 2 WIDISS, *supra* note 3, at 323 (stating that an arbitration award should only be enforced if the agreement to arbitrate was voluntarily made by the parties).

<sup>152</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 220.

<sup>153</sup> Colvin, *supra* note 64, at 585.

<sup>154</sup> Robbins, *supra* note 38, at 21. Minimum requirements of due process were also articulated to include (1) an impartial decision maker, (2) a seasoned arbitrator in the area in dispute, (3) advance notice of the issues to be arbitrated, (4) availability of discovery, (5) rights of comparable representation, and (6) judicial review. Maltby, *supra* note 122, at 18–25. In addition, a law review article author described the core elements of due process in arbitrations to entail basic safeguards such as “notice of the charges or issues, the opportunity for a meaningful hearing, and an impartial decision maker.” Harding, *supra* note 128, at 393 (citation omitted).

<sup>155</sup> Laurie Leader & Melissa Burger, *Lets Get a Vision: Drafting Effective Arbitration Agreements in Employment and Effecting Other Safeguards to Insure Equal Access to Justice*, 8 EMP. RTS. & EMP. POL'Y J. 87, 117 (2004) (commenting that minimum levels of due process include limited discovery, limited hearsay, judicial review, and written arbitral opinions because they are necessary to ensure fairness in the arbitration process).

evidence.<sup>156</sup> Therefore, adequate discovery would provide claimants with access to the necessary information and documents to establish their *prima facie* claim for relief.<sup>157</sup>

Even if these procedural safeguards were guaranteed, critics argue that requiring UM disputes to be resolved through arbitration is unconstitutional in three ways. First, mandatory arbitration denies UM injury victims the requisite access to courts, and thereby deprives them of the due process of law guaranteed by state and federal constitutions.<sup>158</sup> Second, mandatory arbitration deprives UM injury victims of the right to a jury trial provided by most state constitutions and the Seventh Amendment.<sup>159</sup> Third, mandatory arbitration divests UM injury victims of the equal protection of law guaranteed by both state and federal constitutions.<sup>160</sup> Equal protection of the laws may be infringed in UM arbitration because insured claimants are subject to “arbitrary and disparate treatment” based on the varying discretion arbitrators utilize in conducting arbitrations.<sup>161</sup>

Regardless of these constitutional attacks on mandatory arbitration provisions, courts are extremely unlikely to invalidate the agreements.<sup>162</sup> The Supreme Court has demonstrated an extremely flexible approach to determining whether a situation constitutionally satisfies the requisite due

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<sup>156</sup> *Id.*

<sup>157</sup> *See id.*

<sup>158</sup> Hanagan, *supra* note 5, at 116; Sternlight, *supra* note 33, at 1642 (stating that arguments of due process violations are common in the mandatory arbitration context, but it is very uncommon for a court to refuse to enforce an arbitration agreement on the grounds that the parties were afforded with inadequate due process).

<sup>159</sup> Hanagan, *supra* note 5, at 116; Sternlight, *supra* note 33, at 1643 (concluding that the Seventh Amendment argument of claimants being deprived of their right to a jury trial has rarely been successful despite not needing to meet the requirement of proving the state action element). The Seventh Amendment of the United States Constitution states that “in Suits at common law, where the value in controversy shall exceed twenty dollars, *the right of trial by jury shall be preserved*, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.” U.S. CONST. amend. VII (emphasis added).

<sup>160</sup> Hanagan, *supra* note 5, at 116; Sternlight, *supra* note 33, at 1662.

<sup>161</sup> *Bush v. Gore*, 531 U.S. 98, 104–05 (2000) (holding that the Equal Protection Clause is violated when differing voting procedures subject voters to “arbitrary and disparate treatment” of tallying the votes based on the location where the voter resides); *see* Sternlight, *supra* note 33, at 1662.

<sup>162</sup> *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (holding that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”).

process standard.<sup>163</sup> Moreover, the Court has also adopted a national policy favoring arbitration and has placed arbitration agreements on the same footing as other contracts.<sup>164</sup> In fact, the modern trend is “to treat arbitration awards as presumptively valid” while strictly construing any grounds “that would demand the invalidation of the arbitral award.”<sup>165</sup> Accordingly, the liberal national policy favoring arbitration and the common occurrence of courts upholding arbitral awards impairs arguments against the constitutionality of mandatory arbitration.<sup>166</sup> However, the current state of UM arbitration deviates from the procedural protections mentioned in this section, and thereby compels structural changes in order to provide insured claimants a judicious proceeding as if it were conducted under a court’s seal.

### IV. THE UM ARBITRATION STRUCTURE VIOLATES THE RIGHTS OF INSURED CLAIMANTS

The manner in which UM arbitrations are structured and conducted, based on the unfettered discretion of likely conflicted arbitrators, violates the procedural due process rights of insured individuals seeking UM benefits.<sup>167</sup> Because insured individuals are forced into the arbitral forum to resolve their UM disputes, they unknowingly waive their right to trial and also forgo the procedural protections afforded by judicial enforcement mechanisms.<sup>168</sup> Specifically, this section illustrates how the arbitration clause typically found

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<sup>163</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (holding that due process “is not a technical conception” and “calls for such procedural protections as the particular situation demands”). The flexibility present within the Supreme Court’s definition results in increased difficulties for parties to argue that the arbitration procedures provided insufficient due process. *See id.*

<sup>164</sup> Schwartz, *supra* note 27, at 81.

<sup>165</sup> Alexander Panio, *Sphere Drake Insurance Limited v. All American Life Insurance Company: The Seventh Circuit Continues the Evisceration of the Dictum in Commonwealth Coatings*, 2 J. AM. ARB. 405, 416 (2003) (describing how the Seventh Circuit in *Sphere Drake* narrowly interpreted the “evident partiality” standard under the Federal Arbitration Act in order to put forth a general policy in favor of upholding arbitration awards). To get an arbitral award vacated for evident partiality, the moving party must demonstrate “that the arbitrator had an interest in the subject matter of the arbitration or a pre-existing business or social relationship with one of the parties or counsel, which would color the arbitrator’s judgment.” Robbins, *supra* note 38, at 11. Basically, if the arbitrator remains neutral and avoids the appearance of bias, then vacating an award on the evident partiality standard will be unsuccessful. *See id.*

<sup>166</sup> *See* Schwartz, *supra* note 27, at 81; *see* Panio, *supra* note 165, at 416.

<sup>167</sup> *See* discussion *infra* Part IV.B.1–2.

<sup>168</sup> *See* discussion *infra* Part IV.A.

in UM policies, the management of an arbitration proceeding, and the limited opportunity for judicial review of arbitral awards highlight some of the aspects most threatening to individual rights. When the *Matthews* Test is applied to the current state of UM arbitration, an individual's procedural due process rights are infringed, which leads to the inevitable conclusion that the dispute resolution system needs to be changed.<sup>169</sup>

### A. The UM Arbitration Clause

Involuntarily agreeing to arbitrate future UM disputes constitutes one of the major deficiencies in the UM arbitration clause. One important due process principle is that a policy provision which mandates that future disputes be resolved in arbitration should be enforced only when both parties make a voluntary and informed commitment to arbitrate.<sup>170</sup> However, for a variety of reasons, this necessary voluntary consent is often missing, with large insurance companies effectively coercing weaker parties, through adhesion contracts and boilerplate language, into arbitrating all future disputes arising from UM coverage.<sup>171</sup>

In addition to the take-it-or-leave-it policy provision,<sup>172</sup> other aspects of the UM policy impair the purchaser's ability to voluntarily consent to mandatory arbitration. For example, the purchasers of UM coverage do not have an opportunity to inspect the policy terms until several weeks after the purchase, when the insurance policy arrives in the mail.<sup>173</sup> Moreover, once the insured obtains the lengthy policy, the mandatory UM arbitration clause is usually placed in the middle, conveniently beyond the range of focus for the insured.<sup>174</sup> Accordingly, the insured is unlikely to discover the arbitration

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<sup>169</sup> See discussion *infra* Part IV.D.

<sup>170</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 217–19. The institutional author notes that numerous circumstances may undermine the insured's ability to voluntarily agree to arbitrate a dispute over allocation of UM coverage. *Id.* at 217–18. These include an inability to bargain over the policy terms, being unaware of the arbitration provision, and agreeing to the policy before having an opportunity to examine the terms. *Id.*

<sup>171</sup> See Feingold, *supra* note 29, at 284.

<sup>172</sup> See *supra* notes 21–33 and accompanying text (describing how UM arbitration clause is an adhesion-like contract where the individual is not really voluntarily submitting to arbitrate future disputes).

<sup>173</sup> See Feingold, *supra* note 29, at 284; Hanagan, *supra* note 5, at 126.

<sup>174</sup> 2 WIDISS, *supra* note 3, at 321–22 (commenting on how the UM arbitration clause is usually in the middle of a lengthy policy full of small print). Professor Widiss also states that most readers of the policy will be alert while reading the first portion of the policy, but attentiveness subsides as he or she continues reading. *Id.* Therefore, by

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clause until a dispute arises over whether the insured is legally entitled to obtain UM benefits.<sup>175</sup> Even if the insured discovers the arbitration clause in middle of the complicated insurance policy, most individuals do not comprehend that arbitration is different from litigation, and that they are effectively waiving their right to bring UM disputes into court.<sup>176</sup> Therefore, because individuals with UM coverage do not typically read the mandatory arbitration clause, nor do they understand the actual meaning of the terms, voluntary consent in arbitrating future UM disputes is missing.<sup>177</sup> Insureds being forced into arbitration and surrendering their procedural due process rights without knowingly consenting to such a proceeding illustrates the unfairness present in UM arbitration. As a result, the involuntary submission to arbitrate and the possibility of being denied due process fortifies the reality that a change to the UM arbitration structure is necessary.

The lack of voluntary consent to arbitrate future UM disputes with the experienced insurance company has far-reaching implications. With the threatening presence of involuntariness, the insured protected by UM coverage should not lose the right to bring disputes in a court of law.<sup>178</sup> However, typical arbitration clauses mandate that if the insured and insurer disagree about the existence of UM coverage or the actual amount of damages, then both parties are required to resolve the dispute through arbitration.<sup>179</sup> Despite the involuntary submission to arbitration, the insured

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placing the pre-dispute arbitration clause in the middle, most policyholders will not read the provision, or even understand what the nature of such an arbitration clause entails. *Id.* In fact, most policyholders become aware of the arbitration requirement for the first time when a dispute arises. *Id.* This supports Widiss' comment that the parties may not have voluntarily agreed to arbitrate disputes over the UM policy since the policyholder most likely did not get an opportunity to read the arbitration clause. *See id.*

<sup>175</sup> *Id.* Professor Widiss argues that since the insured is unaware of the arbitration provision until an actual dispute arises, there is no voluntary consent. *Id.*

<sup>176</sup> Sternlight, *supra* note 33, at 1648. This is not to say that insurance companies have a duty to inform the purchaser of the arbitration provision. The Note does not argue that insurance companies breach a duty to their insured. However, aspects of the policy serve to ensure, whether intentionally or not, that the insured does not voluntarily agree to arbitrate or even understand the nature of the arbitration clause. *See* 2 WIDISS, *supra* note 3, at 322–25 (stating that individuals are unlikely to discover the UM arbitration clause in the middle of a lengthy policy or will not understand the implications of compulsory arbitration, and therefore individuals do not knowingly consent to submitting disputes for arbitration).

<sup>177</sup> 2 WIDISS, *supra* note 3, at 322–25.

<sup>178</sup> *Id.* at 322.

<sup>179</sup> *Id.* at 297. One law review article compiled data comparing the differences between arbitration and litigation. *See generally* Schwartz, *supra* note 27, at 65–66. The

individual is denied access to court based on the policy language alone. As a result, the mandatory arbitration clause in UM policies substitutes a private system of justice forced onto claimants in exchange for surrendering their right to have a jury decide common law claims, the right to a public hearing, the right to discovery of evidence in the possession of others, and the right to appeal legal or factual errors.<sup>180</sup> Thus, if the structure of UM arbitration was to remain the same, then the playing field would persuasively favor the insurance company that coercively imposed the mandatory arbitration on the insured and fully understood the import of the arbitration clause as effectively displacing the courts. Accordingly, if individuals are to perceive arbitration as providing an equitable proportion of justice, a change is required so that insured claimants can actually consent to the prospective arbitration of disputes and voluntarily waive the procedural right to access the courts.

### *B. The UM Arbitration Proceeding*

Three aspects of the UM arbitration proceeding bring the method of dispute resolution into question as violative of procedural due process rights: (1) the inordinate flexibility arbitrators have in managing the arbitration process, (2) the effective displacement of procedural safeguards found in court, and (3) the dangers facing *pro se* claimants. The flexibility in determining the procedure places no legal mandate on arbitrators to ensure due process principles are reinforced. In addition, displacing the judiciary denies insured claimants avenues of procedural safeguards found in state and federal courts. Furthermore, vulnerable *pro se* claimants probably cannot withstand the injurious effects of dead air silence. Thus, the UM arbitration proceeding, in its current state, removes the assurance that claimants are receiving an equitable proportion of justice and reduces the semblance of legal legitimacy in arbitration.

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median jury verdict award was \$264,700 while the median arbitration award was \$49,400. *Id.* This means half of the claimants in this study received an arbitral award below \$49,500. *See id.* Additionally, for tort claims, the jury decided for the aggrieved plaintiff 47.1% of the time while an arbitrator only deemed the claimant the victor 17.9% of the time. *Id.* Based on this data, arbitration avoids the large awards found in jury trials and also has a greater chance for the corporate defendant to be victorious over the claimant seeking relief. *See id.*

<sup>180</sup> Hanagan, *supra* note 5, at 125.



### 1. *Inordinate Discretion of Arbitrators in Determining Arbitral Procedures*

When UM coverage issues are submitted to arbitration, the arbitrator has full discretion and authority to determine how the proceeding is to be conducted, even if the procedures are not identical to those followed in a court of law.<sup>181</sup> Therefore, an arbitrator has the flexibility to determine whether discovery will be allowed, which evidence can be considered in deciding the dispute, how witnesses will be utilized, and other general matters pertaining to arbitration.<sup>182</sup> In no instance will the arbitrator be required to provide the same process found in the courts, and this lack of similar due process protections erodes UM arbitration's appearance of fairness.<sup>183</sup> Because the arbitrators are under no obligation to follow the rules of evidence, they will infrequently entertain objections in order to preserve the simplicity of the arbitration.<sup>184</sup> Although lawyers often object to improper witness testimony, the arbitrator's discretion favors allowing testimony to proceed over audible objections because a vulnerable jury is not

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<sup>181</sup> See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 40 (1987) (holding that when the subject matter of the dispute can be arbitrated, the procedural questions as to how the hearing is to be conducted are deferred to the arbitrator); see generally 2 WIDISS, *supra* note 3, at 455.

<sup>182</sup> See *Misco*, 484 U.S. at 40.

<sup>183</sup> The fairness standards between arbitration and litigation can be comparable without being completely equal. But this is not the problem. If arbitrators provide the parties procedural safeguards, such as discovery, then arbitrations will appear much more legitimate. See Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 949–51 (2002). However, there is no requirement that arbitrators afford parties any sort of procedure at all. See *Misco* 484 U.S. at 40. Then the proper goal is to create a system where minimal levels of procedural safeguards are required to be found in all UM arbitrations. Without some force of law, arbitrators are not required to provide due process minimums. This is the major problem surrounding UM arbitrations and illustrates the need to change the present structure.

<sup>184</sup> 2 WIDISS, *supra* note 3, at 456–58. This proposition is based on UM arbitrations the author attended during the summer of 2005. When objections were presented by either the insurance defense lawyer or the claimant's counsel, the arbitrator rarely sustained objections. The common response was that the current proceeding was arbitration and not litigation in courts. Thus, the arbitrators were acting under the premise that arbitration was distinct from litigation, making it unnecessary to entertain objections traditionally heard in court.

present.<sup>185</sup> Moreover, the arbitrator also has full authority in determining how much weight should be credited to each evidentiary matter and should generally “evaluate evidence for what it is worth.”<sup>186</sup>

The arbitral procedures pertaining to objections and the weight given to evidence encourages insurance companies to use dead air silence in avoiding or reducing UM coverage obligations to its insured. With arbitrators lacking the vulnerabilities of a jury and wanting to maintain the simplicity of the hearing,<sup>187</sup> objections to insurance defense lawyers using dead air to discredit the insured will likely be unsuccessful.<sup>188</sup> Instead, the arbitrator will permit the insured’s testimony to continue over the objection and enable the dead air to take effect.<sup>189</sup> Because the arbitrator gives weight to evidence for what it is worth, inconsistent testimony will be accorded less weight, and thereby most likely will result in a lower, if any, arbitral award.<sup>190</sup> Although the claimant may be legally entitled to the full policy limits, the present structure of UM arbitration has the ability to prevent proper recovery. Therefore, the inordinate discretion given to arbitrators in allowing testimony to continue over objections and allocating weight to evidence results in the insureds losing out on procedural safeguards found in judicial proceedings that would protect them from such damaging tactics. Without uniform procedures, nothing obligates arbitrators to add safeguards comparable to the judicial system unless the structure of UM arbitration is changed.

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<sup>185</sup> *Id.* at 458. This is where the dead air silence technique reveals the dangers claimants face during UM arbitrations. The claimant’s lawyer will likely object to the insurance defense lawyer’s use of dead air; but because the arbitrator does not sustain objections, dead air silence is allowed to continue and have its effect on the inexperienced claimant.

<sup>186</sup> *Id.* at 456–58.

<sup>187</sup> During a UM arbitration this author attended, the claimant’s counsel objected to the extensive time the supervising attorney was taking in presenting questions. However, the arbitrator overruled the objection to maintain the simplicity of the proceeding.

<sup>188</sup> See 2 WIDISS, *supra* note 3, at 456–58. Professor Widiss states that arbitrators allow the entry of all types of evidence, even over the objections of opposing parties, to help determine whether the insured is entitled to recover from the insurer. *Id.* at 456. In addition, the arbitrator attaches the proper weight to evidence in making this decision. *Id.* at 456–57. Thus, an inconsistent testimony produced by dead air will receive less weight, and therefore adversely affect the insured claimant’s arbitral award. *See id.*

<sup>189</sup> *See id.* at 458.

<sup>190</sup> *See id.* at 456–58.

## 2. Mandatory UM Arbitration Proceedings Displace the Judiciary

Arbitration is inherently distinct from the judicial process, and thereby does not contain the same protective devices. In an arbitration proceeding, the parties choose the arbitrator, or multiple decisionmakers, and in turn the arbitrator determines how the proceeding will be conducted.<sup>191</sup> In contrast, in a judicial proceeding, an officer of the state decides the matter based on principles of law that are often published and available for use as precedent.<sup>192</sup> Additionally, while civil litigation is governed by a body of judicial and legislative standards, arbitration is virtually unregulated because the same judicial and legislative principles are not applicable.<sup>193</sup> Consequently, resorting to arbitration effectively displaces procedures and safeguards that the judiciary provides, which is especially harmful to an individual who does not voluntarily consent to arbitrate the dispute.

The first major procedural aspect highlighted in litigation, but significantly minimized in arbitration, is discovery. Under the current UM arbitration structure, there is only an opportunity for limited discovery,<sup>194</sup> and because the arbitrator has full discretion to determine how to manage the hearing, discovery may not even be granted to the parties.<sup>195</sup> Furthermore, formal discovery procedures, found in the Federal Rules of Civil Procedure, are unavailable in connection with the arbitration process.<sup>196</sup> As a result, parties do not have the right to discover any relevant material that is not privileged<sup>197</sup> or request production of documents.<sup>198</sup> Thus, parties in UM

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<sup>191</sup> See Carrie Menkel-Meadow, *supra* note 183, at 949–51 (arguing that transparency, disclosure, rules, sanctions, and consequences that attach to arbitrators are needed if arbitration is to have any semblance of legal legitimacy).

<sup>192</sup> *Id.* at 949.

<sup>193</sup> Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 362 (1995) (describing the flexibility of commercial arbitrators in defining the procedural aspects of the hearing and the significant differences between arbitrating and litigating the matter in court).

<sup>194</sup> 2 WIDISS, *supra* note 3, at 453.

<sup>195</sup> *Id.* at 519.

<sup>196</sup> *Id.* at 452–53.

<sup>197</sup> FED. R. CIV. P. 26(b) (“Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”). This rule shows the liberal attitude towards discovery in judicial proceedings, and thereby allows parties an opportunity to obtain pertinent information in building their case.

arbitration do not have the tools that are available in court to build their case and support the elements of their argument. However, in a judicial proceeding, the state or federal court is required to abide by rules of procedure and afford parties liberal discovery rights. Therefore, having at-best limited discovery illustrates an example of how arbitrating a UM dispute displaces the judiciary.

Similarly, the arbitration system does not adhere to the codified rules of evidence as is required in the judicial system. Since arbitrations do not have jurors to protect, the rules of evidence play an insignificant role in how the arbitrator manages the UM hearing.<sup>199</sup> Without the rules of evidence, the parties to a UM arbitration will not enjoy certain mandated protections, such as prohibition of unreliable hearsay testimony.<sup>200</sup> However, courts are obligated to be constrained under either state or federal rules of evidence, ensuring that parties receive the protections called for by the rules and that evidentiary matters maintain the indicia of reliability.<sup>201</sup> Thus, failure to adhere to any rules of evidence is another example of how mandatory UM arbitration of disputes displaces the judiciary.

Of significant importance is that arbitration hearings lack the numerous checks present in the litigation system that further ensure accurate and fair results. First, the doctrine of *res judicata* and the beneficial effect of constraining arbitrators to precedent through *stare decisis* are inapplicable in

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<sup>198</sup> FED. R. CIV. P. 34(a) ("Any party may serve on any other party a request to produce . . . to inspect and copy, any designated documents . . ."). In arbitrations, no such procedure to compel the opposing party to produce documents exists. Therefore, this rule provides another example of how the judiciary is displaced with mandatory binding arbitrations.

<sup>199</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 65; Hayford & Peeples, *supra* note 193, at 364 (stating that the American Arbitration Association rules do not mandate that federal and state rules of evidence are applicable in the arbitration context).

<sup>200</sup> FED. R. EVID. 801. Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* Arbitrators, who are not bound by the rules of evidence, could allow hearsay testimony despite its questionable indicia of reliability. Therefore, judicial proceedings not allowing hearsay testimony, unless properly excluded or exempted, illustrates another aspect of how UM arbitrations displace the judiciary.

<sup>201</sup> Kenneth R. Davis, *When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards*, 45 BUFF. L. REV. 49, 133-34 (1997) (arguing that arbitrators are not bound by formal rules of evidence and procedure as judges are). The author states that some may applaud this flexibility to technical rules, but others believe that following technical rules enhances the fairness of the process. *Id.* at 133. When arbitrators rule on evidentiary matters, they often are more lenient than judges who are bound by fulfilling the parties' sense of fairness. *Id.*

UM arbitration.<sup>202</sup> Second, parties to the arbitration do not have the procedural safeguard of petitioning the court for remittitur and additur.<sup>203</sup> These two devices would enable the parties to either reduce or increase the award that the arbitrator renders.<sup>204</sup> Courts, on the other hand, provide all of the aforementioned types of protections.<sup>205</sup> These protections enhance the legal legitimacy of civil litigation, and also provide boundaries within which the proceeding must remain. Implementing such boundaries in UM arbitration would give both the insured and the insurer an expectation of how the hearing would proceed, rather than forcing the parties to rely on the unlimited discretion of the arbitrator. The lack of *res judicata*, *stare decisis*, and measures to increase or reduce an arbitral award convincingly illustrate how UM arbitration displaces the courts, leaving the insured claimant unprotected from the checks found in the civil litigation system.

### 3. *Additional Difficulties with Pro Se Claimants*

The inadequacies present in the UM arbitration structure are undoubtedly revealed when the arbitral hearing involves a *pro se* claimant.<sup>206</sup> If the insured claimant lacks the representation of counsel, then additional safeguards should be implemented because “unsophisticated [parties] are exactly the ones who are most likely to need protection from exploitation.”<sup>207</sup> Moreover, a study found that claimants who have legal representation during

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<sup>202</sup> Hayford & Peeples, *supra* note 193, at 378.

<sup>203</sup> *Id.* at 379.

<sup>204</sup> THOMAS D. ROWE, JR., SUZANNA SHERRY & JAY TIDMARSH, CIVIL PROCEDURE 273 (2004). The casebook describes both remittitur and additur. *Id.* Remittitur passes the test under the Seventh Amendment of the United States Constitution but additur does not. *Id.* However, states generally allow the additur procedure to occur. *Id.* Because these procedures are absent in an arbitration illustrates another example of how mandatory binding arbitration displaces the judiciary.

<sup>205</sup> See Davis, *supra* note 201, at 133–34.

<sup>206</sup> See Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 195–96 (2005).

<sup>207</sup> *Id.* One law review author stated that claimants would be well advised to appear *pro se* in arbitrations where the total claim is below \$20,000. Alan R. Bromberg, *Securities Industry Arbitrations: An Examination and Analysis*, 53 ALB. L. REV. 755, 798 (1989). This means that many claimants in UM arbitrations may appear *pro se* based on the fact that their claims do not exceed \$20,000. See *id.* Thus, the likely presence of multiple *pro se* claimants illustrates further need for a change to the UM arbitration structure. See *id.*

arbitration have a higher probability of obtaining a favorable award.<sup>208</sup> Therefore, *pro se* insured claimants arbitrating the existence of UM coverage are generally weaker than claimants who have retained counsel.<sup>209</sup>

Specific characteristics of *pro se* claimants demonstrate vulnerabilities that do not exist for individuals who enjoy legal representation. Common failings of *pro se* claimants include: (1) unsupported statements of the claim; (2) failure to properly prepare for the hearing; (3) intimidation by the arbitral forum and process; (4) intimidation by the presence of the insurer's counsel; and (5) lack of litigation skills.<sup>210</sup> Based on the *pro se* claimant's relative weaknesses, opposing counsel frequently crosses the thin line between appropriate advocacy for the client and detrimental harassment of a *pro se* claimant.<sup>211</sup>

As the situation presently stands in UM arbitration, subjecting vulnerable unrepresented individuals to the additional effect of dead air silence overwhelmingly tips the balance of fairness in favor of the insurance company.<sup>212</sup> *Pro se* claimants, who may be intimidated by the arbitration process and lack the legal knowledge to assert an adequate claim,<sup>213</sup> will not know how to properly combat the persistent silence or be aware of its controversial use. All that the *pro se* insureds know is that their prior answer does not appear credible to the opposing side, and that additional elaboration is needed to clarify the claim for relief.<sup>214</sup> Although arbitrating without legal representation is the insured's decision, this Note does not seek to propose the correct choices for individuals to make. Rather, this author's intent is to remedy the present UM arbitration framework so that human judgment does not determine the proportion of justice an insured claimant is to receive from the mandatory hearing. Accordingly, the combined effect of arbitrators' unlimited discretion to manage the process, the effective displacement of the

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<sup>208</sup> Shelly R. James, *Arbitration in the Securities Field: Does the Present System of Arbitration Between Small Investors and Brokerage Firms Really Protect Anyone?*, 21 J. CORP. L. 363, 380 (1996). The article's author describes how 60% of the claimants that are represented by a lawyer during arbitrations obtain a favorable award. *Id.* By contrast, 40% of *pro se* claimants were victorious during arbitration. *Id.*

<sup>209</sup> Bales, *supra* note 206, at 195–96; Bromberg, *supra* note 207, at 798.

<sup>210</sup> See J. Kirkland Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors?*, 24 NEW ENG. L. REV. 389, 489 (1989).

<sup>211</sup> Marshall J. Nachbar, *Securities Arbitration: An Arbitrator's Perspective*, 601 SEC. ARB. 635, 648–49 (1988).

<sup>212</sup> See *id.*

<sup>213</sup> See *id.*

<sup>214</sup> See *supra* note 79 and accompanying text.

judiciary, and the visible dangers to *pro se* claimants, is more than sufficient to necessitate procedural changes to UM arbitration.

### *C. Limited Judicial Review of Arbitral Awards*

Although arbitral awards are subject to judicial enforcement, the level of judicial review to ensure the arbitrator made accurate applications of law to fact is extremely minimal, which almost always renders arbitral awards the final outcome to the UM coverage dispute.<sup>215</sup> When an arbitrator issues the award articulating the decision made on the UM claim, the award is complete, final, and binding on the parties to the dispute.<sup>216</sup> In fact, courts are to accord the UM arbitral award a high degree of finality and are prohibited from challenging the sufficiency of the proof used to support the award.<sup>217</sup> As a result, courts have shown great reluctance to overturn an arbitrator's decision.<sup>218</sup> Instead, the proper methodology for a reviewing court is to defer to an arbitrator's ruling, even if it is wrong on its face and causes substantial injustice.<sup>219</sup> Therefore, a UM arbitration award is in actuality a final resolution of the conflict between the insurer and the insured claimant seeking UM benefits.<sup>220</sup>

<sup>215</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 5.

<sup>216</sup> *Id.*

<sup>217</sup> See *United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 36 (1987) (holding that courts play a limited role when reviewing an arbitrator's decision and are not authorized to reconsider the merits of the award even if the parties allege errors of fact or misapplication of law); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (stating that as long as the arbitrator's award does not reflect his or her own brand of justice, then the award is legitimate); 2 WIDISS, *supra* note 3, at 482 (describing the limitations courts adhere to when enforcing an arbitration award while also according the arbitral award a high degree of finality over the dispute).

<sup>218</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 66; see *Mobil Oil Indonesia, Inc. v. Asamera Oil, Ltd.*, 487 F. Supp. 63, 65-66 (S.D.N.Y. 1980) (denying motion to vacate an arbitral award because the panel's statement of reasons had a "barely colorable" justification for the outcome and the decision was not "infested with complete irrationality").

<sup>219</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 66; see *Moncharsh v. Heily & Blasé*, 832 P.2d 899, 900 (Cal. 1992) (holding that an arbitrator's awards are not subject to judicial review for errors of fact and law even if such errors appear on the face of the award and cause the parties substantial injustice). This fortifies the reality that the arbitration award is regarded as the final resolution of the dispute not subject to extensive judicial review. Therefore, an arbitral award for a UM dispute between an insured and the insurer is likely going to be the final outcome that resolves the quarrel.

<sup>220</sup> Meyerowitz, *supra* note 10, at 79.

The narrow judicial review of arbitration awards presents significant problems for insured claimants subjected to the dead air silence technique. As described, when insurance defense lawyers use dead air, the insured claimant will probably offer inconsistent testimony in order to remedy the growing tension produced by the silence. Because the likely result is for the arbitrator to award the insured claimant a lower, if any, recovery than was expected, the narrow judicial review trend becomes a considerable obstacle to achieving the proper relief.<sup>221</sup> Based on this presumption of upholding arbitral awards as the final resolution to the dispute, the insured claimant subjected to dead air silence will be stuck with the inadequate award. Thus, the inability to challenge the arbitration proceeding that enabled the dead air silence tactic and caused a lower recovery highlights the unfairness of the UM arbitration structure. In order for arbitration to obtain legal legitimacy, some grounds for judicial review are needed to prevent the insured claimant from obtaining a miscarriage of justice.<sup>222</sup>

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<sup>221</sup> 2 WIDISS, *supra* note 3, at 456–57 (describing arbitrators allocating weight to specific evidence even though the evidence may be improper under standards utilized in a judicial proceeding); THE AM. ARBITRATION ASS'N, *supra* note 22, at 5 (outlining how arbitral awards are final and binding upon the parties irrespective of the judicial enforcement aspect).

<sup>222</sup> An additional argument, described earlier, is that arbitrators have a business interest in managing arbitrations in a manner that increases their future arbitral appointments. Rau, *supra* note 30, at 521. Although an arbitrator is impartial throughout the proceeding, an economic interest in repeat business creates an inherent conflict of interest that effectively works against the insured claimant seeking relief. See Maltby, *supra* note 122, at 12.

Based on this interest of obtaining future referrals, arbitrators are likely to favor insurance companies in UM coverage disputes for two reasons. First, the insurance company, rather than the insured, is highly likely to be a repeat player in arbitration proceedings, and thereby act as a reliable source for repeat business. Rau, *supra* note 30, at 524–25. Second, the insurance company, being the institutional repeat player, is likely to develop an “institutional memory.” *Id.* at 525. This means that the insurer, and not the insured, will have the incentive to investigate the arbitrator’s background and monitor his or her past awards. *Id.* Thus, UM arbitrators are naturally conflicted towards pleasing the insurance company through subconsciously skewed arbitration decisions in hopes of obtaining future arbitral appointment. Regardless of the merits of the dispute, UM arbitration decisions have a strong likelihood of being tainted because of the insurer-favoritism. Accordingly, the partiality of UM arbitrators increases the steepness of the hill insured claimants must try to climb in obtaining the appropriate arbitral award.



### D. Applying the Three Factors in *Matthews* to UM Arbitrations

Application of the *Matthews* Test demonstrates that procedural due process improvements are warranted in the UM arbitration structure because of its constitutional inadequacies.<sup>223</sup> The significant private interests involved are apparent when insured claimants obtain a deficient recovery after being forced into an arbitral forum, have their rights determined by the inordinate discretion of an arbitrator, waive the protections found in court, and lose the opportunity for judicial review.<sup>224</sup> Moving to the second prong of the test, an erroneous deprivation of the proper UM recovery is possible because of unpredictable arbitral procedures, non-adherence to judicial protections, and the improper techniques used by insurance defense lawyers.<sup>225</sup> On the other hand, substituted procedures that ensure voluntary consent of the insured to arbitrate, a uniform procedural system of arbitrating UM disputes, and a greater degree of judicial review would enhance the fairness of results while increasing public confidence in the dispute resolution system.<sup>226</sup> Moreover, the third criterion shows that the government's interest in an improved UM arbitration system will not increase the administrative costs.<sup>227</sup> The government, as a result, will be benefited by having more individuals willing to arbitrate their disputes rather than clogging up the civil litigation system. Therefore, procedural due process in the current UM arbitration structure is inadequate because significant private interests are impaired and because there is value in implementing substituted procedural safeguards that do not increase governmental administrative costs. Considering these factors, the "specific dictates of due process" are violated, necessitating structural reforms to UM arbitration.

## V. BARRIERS TO PROCEDURAL DUE PROCESS CHANGES IN UM ARBITRATION

According to the aforementioned *Matthews* analysis, the current state of UM arbitration violates the Due Process Clause because significant private interests are impaired, there is high probability of erroneous deprivation of private rights under current UM arbitration procedures, and the government

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<sup>223</sup> See *infra* notes 224–227 and the accompanying text.

<sup>224</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> See *id.*

interest would be benefited by changes to the procedures.<sup>228</sup> Despite the need for constitutional conformity, many significant barriers are present to prevent structural reforms in UM arbitration. One such barrier is the consideration of whether state action actually exists in UM arbitration and is sufficient to bring the dispute resolution system under the ambit of the Due Process Clause.<sup>229</sup> In addition, a second barrier is whether the FAA is applicable to UM arbitration.<sup>230</sup> If the FAA applies to UM arbitration, then claimants would be entitled to access the courts after receiving arbitral awards under federal question jurisdiction,<sup>231</sup> and thereby receive due process protections from federal courts. However, if the FAA does not apply, then federal courts can only hear the UM dispute if diversity of citizenship exists and the amount in controversy is met; but this is highly unlikely to be satisfied in the UM context.<sup>232</sup>

### A. *The State Action Problem*

Based on the current framework of UM arbitration, there are numerous arguments against the existence of state action, thereby perpetuating the dispute resolution system's procedural due process inadequacies.<sup>233</sup> UM arbitration is private, and the arbitrators managing the process are not deemed government officials.<sup>234</sup> As a result, a non-governmental official, like an arbitrator deciding a UM dispute, can deny "due process of law"

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<sup>228</sup> See discussion *supra* Part IV.D.

<sup>229</sup> See discussion *infra* Part V.A.

<sup>230</sup> See discussion *infra* Part V.B.

<sup>231</sup> 28 U.S.C. § 1331 (2004). The statute provides that "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." *Id.*

<sup>232</sup> See *infra* notes 244–47 and accompanying text (arguing the probable inapplicability of the FAA, which eliminates the procedural safeguards associated with federal courts upon obtaining jurisdiction under 28 U.S.C. § 1331).

<sup>233</sup> Sternlight, *supra* note 33, at 1642–43 (establishing state involvement sufficient to rise to a level of state action between two private parties agreeing to arbitrate is very difficult to prove); Harding, *supra* note 128, at 393–94 (concluding that courts have consistently held that private arbitrations lack any element of state action and therefore are not subject to constitutional requirements of procedural due process).

<sup>234</sup> See *Holmes v. Nat'l Football League*, 939 F. Supp. 517, 523–24 (N.D. Tex. 1996) (holding that the arbitrator depriving the football player of the right to cross examine and introduce expert testimony did not violate procedural due process because arbitrators are private actors not subject to the Fourteenth Amendment Due Process Clause).

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without giving rise to a constitutional complaint.<sup>235</sup> Because of the state action doctrine and the absence of state action elements, private UM arbitration would not have to comport with the requirements of procedural due process found in the Fourteenth Amendment.<sup>236</sup>

As a general rule, constitutional due process protections do not extend to private conduct abridging individual rights.<sup>237</sup> Thus, only state action is subject to scrutiny under the Due Process Clause.<sup>238</sup> The test for determining the existence of state action is whether the state provided a mantle of authority that enhanced the power of the harm-causing individual actor.<sup>239</sup> According to the test, arbitrators in UM arbitrations that deny common procedural safeguards found in judicial proceedings do not enhance their powers under the authority of the state, but rather obtain their powers based on the agreement of the parties.<sup>240</sup> Accordingly, UM arbitrators would not be considered state actors, and their common denial of procedural due process safeguards would not be considered a constitutional violation under the Fourteenth Amendment. Therefore, the missing state action element in UM arbitration provides no legal authority mandating procedural due process changes to the UM arbitration structure.

Moreover, there is a public policy argument against making arbitration subject to the scrutiny of constitutional review. Requiring UM arbitration to adhere to the procedural due process requirements of the Fourteenth Amendment would constitutionalize the private dispute resolution system.<sup>241</sup> Consequently, the simplicity, informality, and appeal of the arbitral forum as an alternative means for resolving disputes would be seriously undermined

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<sup>235</sup> *See id.*

<sup>236</sup> Harding, *supra* note 128, at 393–94; U.S. CONST. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law . . .”). Based on these words, states, or actors representing the state, must deprive due process of law in order for the constitutional right to be infringed. This creates the state action doctrine.

<sup>237</sup> Nat’l Collegiate Athletic Ass’n v. Tarkanian, 488 U.S. 179, 191 (1988) (deciding that the method in which the NCAA fired Tarkanian did not deprive him of procedural due process because the NCAA did not get its mantle of authority from state law, and thereby was not a state actor subject to constitutional restrictions).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 192.

<sup>240</sup> *See* THE AM. ARBITRATION ASS’N, *supra* note 22, at 5.

<sup>241</sup> *See* Davis v. Prudential Sec., Inc., 59 F.3d 1186, 1193–94 (11th Cir. 1995) (deciding that the limited state action of confirming arbitral awards is insufficient for mandating arbitrators to comply with the Federal Due Process Clause under the Fourteenth Amendment).

by adhering to the Constitution's requirements.<sup>242</sup> Therefore, policy against constitutionalizing UM arbitration will ensure that the state action element remains missing.

There is one argument that suggests that arbitration satisfies the state action element, and thereby is subject to the Due Process Clause. In *Shelley v. Kraemer*,<sup>243</sup> the Supreme Court held that a court's enforcement of a private contract constitutes state action within the meaning of the Due Process Clause.<sup>244</sup> Extending this rationale, because courts must enforce arbitration awards for the decision to become effective,<sup>245</sup> a plausible argument for the existence of state action in private arbitration exists. However, the principles in *Shelley* have been limited to the specific facts of the case,<sup>246</sup> and multiple federal courts decline to recognize the limited court involvement present in arbitration as state action sufficient to trigger the Due Process Clause.<sup>247</sup>

Notwithstanding the Supreme Court's ruling in *Shelley*, UM arbitration is unlikely to contain elements of state action that would trigger adherence to constitutional procedural due process requirements. Although state action presents a formidable barrier to procedural due process improvements, a change to the insurer-created UM arbitration structure is necessary so that insured claimants can receive their equitable proportion of justice and the public can have confidence in the dispute resolution system. Accordingly, effectively altering the UM arbitration structure should probably be independent of the Fourteenth Amendment Due Process Clause.

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<sup>242</sup> *Id.*

<sup>243</sup> *Shelley v. Kraemer*, 334 U.S. 1 (1948).

<sup>244</sup> *Id.* at 19–20 (holding that a state court enforcing a restrictive covenant that prohibits African-Americans from living in a specific residential area was considered enough state action for purposes of meeting the Fourteenth Amendment requirement).

<sup>245</sup> See 2 WIDISS, *supra* note 3, at 481.

<sup>246</sup> See generally Edward Brunet, *Arbitration and Constitutional Rights*, 71 N.C. L. REV. 81 (1992) (arguing that even though parties to an arbitration opted out of the judicial system including its constitutional protections, many of the arbitral participants lacked knowledge of the implications of their agreement to arbitrate, and thereby some measures of due process are needed if arbitration is to convey a notion of fairness).

<sup>247</sup> *Davis*, 59 F.3d at 1192; *United States v. Am. Soc'y of Composers, Authors and Publishers*, 708 F. Supp. 95, 96–97 (S.D.N.Y. 1989) (holding that mere court approval of an arbitral award is not state action, and thereby arbitrators are not subject to constitutional due process limitations).

## B. Applicability of the FAA

The FAA requires courts to enforce privately negotiated agreements to arbitrate disputes, like any other contract, in accordance with their terms.<sup>248</sup> Applicability of the FAA requires the arbitration agreement to “evidenc[e] a transaction involving commerce.”<sup>249</sup> Once an arbitration agreement is found to affect commerce, the agreement will be declared “valid, irrevocable, and enforceable.”<sup>250</sup> Combined with this liberal policy favoring the enforceability of arbitration agreements are numerous grounds upon which an arbitration award can be vacated due to arbitrator misconduct.<sup>251</sup> These statutory grounds for vacating an arbitral award enable an insured seeking UM benefits to obtain due process protections in federal court after being subjected to deficient procedural safeguards in the UM arbitration.

The FAA mandates that courts supervise arbitration affecting commerce to ensure that the arbitral proceeding provides due process protections.<sup>252</sup> Section 10 of the FAA allows courts to vacate an arbitration award if the

<sup>248</sup> 9 U.S.C. § 2. The relevant provision states that

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (2000 & Supp. 2006).

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> 9 U.S.C. § 10(a). The relevant provision is as follows:

- (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
  - (1) where the award was procured by corruption, fraud, or undue means;
  - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
  - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
  - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a) (2000 & Supp. 2006).

<sup>252</sup> *See* 9 U.S.C. § 2.

award was procured through “undue means,”<sup>253</sup> or if the arbitrator’s misconduct caused the “rights” of any party to be prejudiced.<sup>254</sup> The FAA’s “undue means” and “rights” language focuses on procedures, requiring judges to look for procedural irregularities.<sup>255</sup> Because the act of finding procedural inconsistencies is evident in the framework of the due process standard, arbitration within the FAA must follow a correct procedural model.<sup>256</sup> Additionally, the term “rights” may be in reference to constitutional rights because there are no other rights that could exist in the context of a federal statute.<sup>257</sup> The cumulative effect of the “undue means” and “rights” language mandates the implementation of constitutional due process minimums for arbitration under the FAA.<sup>258</sup> Accordingly, arbitration within the ambit of the FAA must incorporate due process protections.

Constitutional procedural due process minimums would have to be adhered to if the FAA governed UM arbitration. In order for UM arbitration to fall under the FAA, the arbitration must satisfy the jurisdictional nexus of affecting interstate commerce.<sup>259</sup> With insurance considered a subject of commerce, if the insured and insurer reside in different states, then the UM insurance policy would affect interstate commerce, thus triggering FAA governance.<sup>260</sup> However, if the insured and insurer reside in the same state, then the effect on commerce would be intrastate, resulting in the UM arbitration policy falling beyond the scope of the FAA.<sup>261</sup> In all likelihood, the insured and insurer will be from the same state—because logically and in general, most people purchase automobile insurance from a company located within their state of residence<sup>262</sup>—which would suggest the UM arbitration

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<sup>253</sup> 9 U.S.C. § 10(a)(1) (stating that grounds for vacating an arbitral award exists when “the award was procured by corruption, fraud, or undue means”).

<sup>254</sup> 9 U.S.C. § 10(a)(3) (stating that grounds for vacating an arbitral award exists when “the rights of any party have been prejudiced”).

<sup>255</sup> Maltby, *supra* note 122, at 16.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 16–17.

<sup>259</sup> 9 U.S.C. § 2 (2000 & Supp. 2006).

<sup>260</sup> THE AM ARBITRATION ASS’N, *supra* note 22, at 62. The institutional author describes that if the insurer and the insured live in different states, then the policy governing this relationship would affect interstate commerce. *Id.* As a result, the jurisdictional nexus of FAA would be satisfied, and thereby require courts to ensure due process protections are provided in UM arbitrations. *See* Maltby, *supra* note 122, at 16–17.

<sup>261</sup> THE AM ARBITRATION ASS’N, *supra* note 22, at 62.

<sup>262</sup> *See id.*

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clause involves intrastate commerce. As a result, UM policies will most likely fail to satisfy the jurisdictional nexus requirement of the FAA; therefore, legal authority to mandate procedural changes in the UM arbitration structure is probably missing.

The likely inapplicability of the FAA can still get insured claimants the due process protections equivalent to a judicial proceeding if federal courts obtain diversity jurisdiction over the UM coverage dispute. Diversity jurisdiction is premised upon the parties residing in different states and requires that the amount in controversy exceed \$75,000.<sup>263</sup> As previously mentioned, the insured claimant and the insurance company are most likely going to reside in the same state. But more importantly, the \$75,000 amount in controversy requirement is rarely going to be satisfied because UM policy limits usually range from \$12,500 to \$50,000.<sup>264</sup> Because the policy limits prevent the claim from exceeding the \$75,000 amount in controversy requirement, federal courts will not have diversity jurisdiction to hear a UM dispute and afford parties due process of law.

Thus, the probable lack of state action, the possible inapplicability of the FAA, and the expected inability to satisfy the amount in controversy requirement are obstacles to the establishment of judicial-like procedural safeguards in UM arbitration. However, if the current UM dispute resolution system continues to perpetuate improper insurance defense techniques, such as dead air silence, then deserving insured claimants will be unable to receive their legally entitled recovery—namely the UM policy limits. Therefore, if the general public is to view UM arbitration with a semblance of legal legitimacy and exercise a willingness to arbitrate disputes, then the structure of UM disputes needs to be altered.

### VI. A SOLUTION TO PROCEDURAL DEFICIENCIES IN UM ARBITRATION

Irrespective of the numerous obstacles to legally obtaining procedural adequacy in UM arbitration, other avenues can provide preliminary solutions. Although a completely fair arbitration is not legally required, an improvement in the arbitral system is a first step toward a fairer process of resolving UM disputes. The solution with the most potential is incorporating a due process protocol specifically governing UM arbitration.

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<sup>263</sup> 28 U.S.C. § 1332(a) (2004) (“The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and costs, and is between—(1) citizens of different states . . .”).

<sup>264</sup> This information is based on the author’s experience as a summer clerk in the corporate legal department of an insurance company.

Due process protocols have been adopted with success in the employment, consumer, and health care spheres, and could prove to be the solution in improving the procedural safeguards for insured claimants.<sup>265</sup> Implementing a similar due process protocol for UM arbitration will define the standards and procedures to which arbitrators should conform,<sup>266</sup> instead of allowing them to utilize their inordinate discretion.<sup>267</sup> Most importantly, a due process protocol will give insured claimants the perception that they are receiving the correct proportion of justice, and will also increase the public confidence in arbitration as an effective dispute resolution system. Analyzing the framework of due process protocols and the beneficial effects existing protocols have had on arbitration, demonstrates that extending a due process protocol specifically governing UM arbitration is a promising solution for curing the effects of dead air silence while also combating the negative characteristics associated with the current structure.

#### *A. The Due Process Protocol Trend*

In the past eight years, arbitration law has evolved to incorporate due process protocols to govern the manner in which arbitrations are conducted.<sup>268</sup> This evolution is best illustrated by the creation of the Employment Protocol, Health Care Protocol, and Consumer Protocol to regulate the arbitration conducted in these respective fields.<sup>269</sup> While the three due process protocols differ in substantive ways, they all seek to ensure a minimally fair process for parties by providing standards and procedures for arbitrators to follow in managing arbitration.<sup>270</sup> These protocols were developed by task forces and advisory committees of various groups interested in the resolution of employment, health care, and consumer issues.<sup>271</sup> Infusing due process protections was thought to be essential if arbitration was to act as a substitute, or a reasonable equivalent, for judicial models.<sup>272</sup> The protocols have thus far served two significant functions: (1)

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<sup>265</sup> See Harding, *supra* note 128, at 369 (explaining that due process protocols in all three fields seek to ensure a minimally fair process for disputants by providing for standards and procedures arbitrators are to follow when conducting arbitrations).

<sup>266</sup> See *id.*

<sup>267</sup> See discussion *supra* Part IV.B.1.

<sup>268</sup> Harding, *supra* note 128, at 369.

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*

<sup>272</sup> *Id.* at 395.



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they inform the courts of the due process necessary in an arbitration process to effectively vindicate a party's rights, and (2) they provide a standard to judge certain arbitration practices and procedures.<sup>273</sup>

Due process protocols in the employment, health care, and consumer spheres serve numerous purposes.<sup>274</sup> First, the protocols reveal a clear attempt to regulate the arbitration process by ensuring the perception and the experience of fairness for the disputants.<sup>275</sup> A second purpose of the protocols is to establish standards to fill in the procedural gaps that the Supreme Court has left open.<sup>276</sup> Third, due process protocols seek to preserve arbitration's reputation as a useful and effective alternative dispute resolution process, especially for those individuals removed from the current judicial system.<sup>277</sup> The final purpose of the three due process protocols is to level the procedural playing field for those claimants who are required to resort to arbitration as a result of the "unilateral imposition of arbitration in a contract of adhesion."<sup>278</sup>

Because the Employment Protocol influenced the creation of closely identical counterparts in the health care and consumer fields, the procedural protections contained in the Employment Protocol reveal materially significant principles of what process is due.<sup>279</sup> The specific procedural safeguards arbitrators must afford include: (1) providing reasonable discovery, (2) defining issues to be arbitrated, (3) preserving order in the hearing, (4) ruling accurately on evidentiary matters, (5) determining when the hearing will close, (6) issuing an award that resolves the submitted dispute, and (7) supplying the parties with a written opinion.<sup>280</sup> Members of

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<sup>273</sup> *Id.* at 412.

<sup>274</sup> Nat'l Conference of Commissioners on Uniform State Laws, *Uniform Arbitration Act-2000*, 3 PEPP. DISP. RESOL. L. J. 323, 351 (describing the general purpose of due process protocols is to ensure procedural and substantive fairness in arbitrations where adherence with the articulated standards will make arbitration a legitimate alternative to litigation).

<sup>275</sup> Harding, *supra* note 128, at 416.

<sup>276</sup> *Id.*

<sup>277</sup> *Id.*

<sup>278</sup> *Id.*

<sup>279</sup> *See id.* at 369.

<sup>280</sup> AM. ARBITRATION ASS'N, DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP § C.5 [hereinafter "EMPLOYMENT DUE PROCESS PROTOCOL"], available at <http://www.adr.org/sp.asp?id=28535>. A pertinent portion of the due process protocol for employment disputes is as follows:

the task force felt due process safeguards should be encouraged to protect individuals (as opposed to corporate defendants) who do not have effective access to judicial relief.<sup>281</sup> As a result, each provision should be interpreted under the protocol's principal focus, which is promoting "standards of exemplary due process."<sup>282</sup> More importantly, arbitrators "must be independent of bias toward either party" and should refrain from imposing procedures that lack requisite due process.<sup>283</sup> Finally, an arbitrator's award that complies with the due process requirements contained in the protocol will be final and binding and the scope of review will be limited.<sup>284</sup>

Similar to the Employment Due Process Protocol, its consumer counterpart was created in response to fairness concerns regarding conflict resolution mechanisms under the boilerplate language of take-it-or-leave-it contracts.<sup>285</sup> The stated mission of the Consumer Protocol's Advisory Committee is to develop minimum standards and procedures for the

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The arbitrator should be bound by applicable agreements, statutes, regulations and rules of procedure of the designating agency, including the authority to determine the time and place of the hearing, permit reasonable discovery, issue subpoenas, decide arbitrability issues, preserve order and privacy in the hearings, rule on evidentiary matters, determine the close of the hearing and procedures for post-hearing submissions, and issue an award resolving the submitted dispute.

The arbitrator should be empowered to award whatever relief would be available in court under the law. The arbitrator should issue an opinion and award setting forth a summary of the issues, including the type(s) of dispute(s), the damages and/or other relief requested and awarded, a statement of any other issues resolved, and a statement regarding the disposition of any statutory claim(s).

#### EMPLOYMENT DUE PROCESS PROTOCOL § C.5.

<sup>281</sup> *Id.* at Genesis ("[A]rbitration of statutory disputes conducted under proper due process safeguards should be encouraged in order to provide expeditious, accessible, inexpensive and fair private enforcement of statutory employment disputes for the 100,000,000 members of the workforce who might not otherwise have ready, effective access to administrative or judicial relief.").

<sup>282</sup> *Id.* § A ("The focus of this protocol is on standards of exemplary due process").

<sup>283</sup> *Id.* § C.1.

<sup>284</sup> *Id.* § D. Because due process is afforded to the parties, there is no need to access the courts. Therefore, an arbitral award that is final and binding when rendered in a proceeding with due process does not deprive a party of receiving an equitable proportion of justice.

<sup>285</sup> AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL [hereinafter "CONSUMER DUE PROCESS PROTOCOL"], Introduction: Genesis of the Advisory Committee, available at <http://www.adr.org/sp.asp?id=22019>.

equitable resolution of consumer disputes, and thereby attempt to enhance consumers' reasonable expectation of fairness.<sup>286</sup>

Specifically, the Consumer Protocol entitles all parties to a fundamentally fair dispute resolution process, a principle that should be observed in structuring alternative dispute resolution (ADR) programs.<sup>287</sup> Furthermore, consumers must be given full and accurate information about the arbitration provision at the time the consumer contracts for goods or services.<sup>288</sup> This includes notice of the arbitration clause, an explanation of the consequences of arbitrating rather than litigating a dispute, whether the clause is mandatory, and the distinctions between arbitration and court proceedings.<sup>289</sup> Therefore, the Consumer Protocol provides useful guidance in how agreements to arbitrate increase their legitimacy and work toward providing a "fundamentally-fair ADR process."<sup>290</sup> In addition to a claimant's procedural rights being improved, the beneficial effects of existing protocols demonstrate the need for a due process protocol to govern UM arbitration.

### *B. Effects of the Due Process Protocols and the Probable Impact on UM Arbitration*

Implementing a due process protocol for UM arbitration would only present viable solutions if the beneficial effects in the employment, health care, and consumer fields are established. The Employment Protocol has assured employers some measure of fairness and due process to employer-promulgated schemes to arbitrate disputes.<sup>291</sup> Due process protocols have been described as having a "tremendous impact" on arbitration because major arbitration service providers (such as the American Arbitration Association) have agreed to follow the protocols and draft rules consistent

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<sup>286</sup> *See id.*

<sup>287</sup> *Id.* at Principle 1: Fundamentally-Fair Process ("All parties are entitled to a fundamentally-fair ADR process. As embodiments of fundamental fairness, these Principles should be observed in structuring ADR Programs.").

<sup>288</sup> *Id.* at Principle 2: Access to Information Regarding ADR Program ("Providers of goods or services should undertake reasonable measures to provide Consumers with full and accurate information regarding Consumer ADR Programs, at the time the Consumer contracts for goods or services.").

<sup>289</sup> *Id.* at Principle 11: Agreements to Arbitrate (stating that consumers must be given "clear and adequate notice of the arbitration provision and its consequences, including a statement of its mandatory or optional character...including basic distinctions between arbitration and court proceedings").

<sup>290</sup> *Id.* at Principle 1: Fundamentally-Fair Process.

<sup>291</sup> Harding, *supra* note 128, at 369.

with the principles of the protocols in conducting arbitration.<sup>292</sup> Additionally, implementing the protocols has resulted in a self-regulatory effort by the arbitration industry to infuse due process protections, which invariably promotes the use of ADR for settling certain disputes.<sup>293</sup>

Furthermore, the incorporation of due process protocols has enhanced arbitration's reputation as an effective dispute resolution mechanism.<sup>294</sup> The recent commitment to ensure that due process protection is provided has helped legitimize the growing use of pre-dispute arbitration clauses in adhesion contracts.<sup>295</sup> Moreover, the due process protocols have also effectively fended off more direct government regulation of the arbitration industry and have maintained the Supreme Court's national policy favoring arbitration.<sup>296</sup> Most importantly, the arbitration industry's agreement to abide by a due process protocol has prevented the drafters of pre-dispute clauses from gaining an unfair advantage in the arbitral process.<sup>297</sup> This means that corporate and institutional defendants can no longer express restrictions in how the arbitration is to proceed because the due process protocol will generally govern those matters.

In addition, an arbitrator's discretion in managing the hearing is limited because the due process protocol establishes the requisite procedural safeguards to be included in arbitration.<sup>298</sup> The repeat player problem is also solved with implementation of due process protocols because arbitrators are required to disclose any circumstances likely to compromise impartiality, such as financial interest that might affect the result of the proceeding.<sup>299</sup> As

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<sup>292</sup> *Id.* at 369–70.

<sup>293</sup> *Id.* at 370–71.

<sup>294</sup> *Id.* at 371.

<sup>295</sup> *Id.*

<sup>296</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (citation omitted) (holding that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration”); Harding, *supra* note 128, at 371 (arguing that the favored status of arbitration is in reference to the *Gilmer* decision where the Supreme Court articulated a national policy favoring arbitration as an adequate method in resolving disputes among private parties). The author suggests that due process protocols have maintained this favored status because of the procedural safeguards implemented in arbitration. *Id.* Infusing procedural safeguards have resulted in a perception of fairness associated with arbitrating disputes, and thereby continually sustains the Supreme Court's national policy favoring arbitration. *See id.*

<sup>297</sup> Harding, *supra* note 128, at 401.

<sup>298</sup> EMPLOYMENT DUE PROCESS PROTOCOL, *supra* note 280, § C.5.

<sup>299</sup> *Id.* § C.4 (arbitrators have a “duty to disclose any relationships which might reasonably constitute or be perceived as a conflict of interest”); CONSUMER DUE PROCESS

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a result, the due process protocol has legitimized arbitration as a preferred method of dispute resolution, has eliminated the unfair advantage corporate defendants possessed, and has eradicated the fear of not knowing how arbitrators will utilize their discretion in conducting the proceeding.

The impact of the due process protocol has also extended into the judicial forum. In one case, the Federal District Court of South Carolina held that an arbitration agreement, which was widely found by experts to be contrary to the Employment Protocol,<sup>300</sup> was void for being unconscionable and a violation of public policy.<sup>301</sup> The standards set forth in the Employment Protocol provide courts with guidance in determining the appropriate rules for conducting arbitration.<sup>302</sup> Because the arbitration rules in the South Carolina case did not comply with those standards, this is arguably a factor that led the court to invalidate the agreement to arbitrate disputes.<sup>303</sup> Therefore, non-compliance with due process principles outlined in the various protocols can lead courts to invalidate both the arbitration agreement and the subsequent award.

UM arbitration should follow the general trend of adopting a due process protocol to assure parties of procedural safeguards and maintain fairness in the arbitral forum. By creating a due process protocol similar to the employment version, the procedural playing field between the insured claimant and the insurance company will be leveled. This means that the protocol will have predetermined UM arbitration procedures and standards, instead of being deferred to the unfettered discretion of potentially conflicted arbitrators. Additionally, providing due process safeguards eliminates the concern that mandating arbitration of UM disputes will displace the judiciary. Under an employment-like protocol, insured claimants seeking

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PROTOCOL, *supra* note 285, at Principle 3.5 (arbitrators have a duty to disclose "any circumstance likely to affect impartiality, including any bias or financial or personal interest which might affect the result of the ADR proceeding"); Leader & Burger, *supra* note 155, at 116 (arguing that implementing due process protocols along with the disclosure obligations for arbitrators diminishes the repeat player effect).

<sup>300</sup> *Hooters of Am., Inc. v. Phillips*, 39 F. Supp. 2d 582, 600-01 (D.S.C. 1998).

<sup>301</sup> See generally *id.* at 614 (denying the motion to compel arbitration because the existence of multiple one-sided provisions exclusively favoring the employer results in the invalidation of the arbitration agreement for being unconscionable and violating public policy). Even though the court did not specifically invalidate the arbitration agreement for deviating from the Employment Protocol, the protocol's standards provided a "benchmark" for the court to determine appropriate arbitration rules. Harding, *supra* note 128, at 410-11.

<sup>302</sup> Harding, *supra* note 128, at 410-11 & n.242.

<sup>303</sup> See *id.* at 410-11.

UM coverage will have the opportunity for discovery; immediate decisions on evidentiary matters, and relief that is available in courts.<sup>304</sup> Moreover, incorporating a consumer-like protocol provision that gives individuals clear notice of the arbitration provision will bring greater awareness to the nature and manner of resolving future disputes.<sup>305</sup> As a result, the controversial characteristics of mandatory arbitration clauses will be diminished because UM arbitration governed under a due process protocol will afford insured claimants protections comparable to judicial action. But as an added protection, a UM due process protocol that is similar to the Employment Protocol will not allow the insureds to waive their right to judicial relief arising out of the contractual relationship with the insurer for any reason.<sup>306</sup> Thus, insured claimants have the benefit of obtaining a court-like proceeding in a more expeditious arbitral forum, while still retaining the right to have a court resolve the dispute.

Perhaps of greater significance is how implementation of a due process protocol can prevent insurance defense lawyers from using dead air silence to reduce or nullify a company's UM coverage obligation. According to the Employment Protocol, each provision is to be interpreted under standards of "exemplary due process."<sup>307</sup> Thus, an arbitrator will be obligated to protect the insured claimant from the intentional use of dead air.<sup>308</sup> Witnessing the effects the dead air tension undeniably causes the insured claimant will require the arbitrator to sustain objections raised by the insured's counsel and assure that "exemplary due process" has been provided. The resulting outcome is that the insureds will not be susceptible to creating inconsistencies in their testimony, and therefore will be more likely to receive an arbitral award that accurately compensates them for the damages that were incurred. Furthermore, an arbitrator is required to provide an expeditious hearing.<sup>309</sup> Using dead air silence consumes valuable time and

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<sup>304</sup> EMPLOYMENT DUE PROCESS PROTOCOL, *supra* note 280, § C.5.

<sup>305</sup> See CONSUMER DUE PROCESS PROTOCOL, *supra* note 285, at Principle 2: Access to Information Regarding ADR Program, Principle 11: Agreement to Arbitrate.

<sup>306</sup> See EMPLOYMENT DUE PROCESS PROTOCOL, *supra* note 280, § A ("employees should not be permitted to waive their right to judicial relief . . . for any reason."); see also CONSUMER DUE PROCESS PROTOCOL, *supra* note 285, at Principle 1: Fundamentally-Fair ADR Process ("All parties are entitled to a fundamentally-fair ADR process.").

<sup>307</sup> EMPLOYMENT DUE PROCESS PROTOCOL, *supra* note 280, § A.

<sup>308</sup> See *id.*

<sup>309</sup> *Id.* at Genesis.

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detracts from the purpose of providing an expeditious hearing.<sup>310</sup> Due process protocols supply arbitrators with another avenue to prevent the insurer's intentional use of dead air silence. Therefore, implementing a due process protocol that specifically governs UM arbitration not only creates fairness in the arbitral forum, but also thwarts the use of unfair tactics such as dead air silence.

A due process protocol for UM arbitration can alleviate many of the procedural deficiencies found in the current dispute resolution system. To ensure the maximum benefits of such a protocol, a provision should be included noting that a violation of the UM Due Process Protocol will result in the reviewing court vacating the arbitration award on judicial review.<sup>311</sup> Thus, in order for arbitrators' awards to be preserved, they must conduct arbitration in accordance with standards of due of process. As a result, adopting a UM due process protocol enables an insured claimant to receive procedural safeguards comparable to a judicial proceeding, and thereby retain a sense of fairness in the result and confidence in arbitration as an effective dispute resolution mechanism.

## VII. CONCLUSION

While UM coverage disputes resolved through arbitration are almost always mandatory,<sup>312</sup> the process does not have to deprive parties of fairness. Under the current structure of UM arbitration; there are many aspects that would appear to outsiders to be one-sided and against the insured individual, as well as violative of procedural due process rights. Just one example of the inequities in UM arbitration is the insurer's use of dead air to damage the credibility of the insured before the eyes of the arbitrator, who will most likely take this into consideration when issuing the binding arbitral award. The combination of arbitrators using unfettered discretion to manage the UM arbitration process and subconsciously skewing the procedures in favor of the repeat insurance player perpetuates the intentional use of dead air. Whether dead air silence is used by all insurance companies or in all regions is irrelevant. The fact that the UM arbitration structure allows the tactic to be used illustrates the unfairness associated with the process and the need for a change.

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<sup>310</sup> See *id.* (stating how due process safeguards should be employed to encourage a proceeding that is expeditious, accessible, inexpensive, and fair).

<sup>311</sup> See Leader & Burger, *supra* note 155, at 124.

<sup>312</sup> THE AM. ARBITRATION ASS'N, *supra* note 22, at 104.

Implementing a due process protocol specifically governing UM arbitration would ensure that the letter and spirit of UM arbitration comports with procedural due process. Similar protocols have been adopted recently in the employment, health care, and consumer industries with successful results,<sup>313</sup> and it would make sense for the large automotive insurance industry to conform to the trend of introducing due process protections in UM arbitration. Even though adoption of the UM Protocol may not solve all procedural deficiencies found in the current structure of arbitration, it is a first step toward an improved system. As such, incremental gains can result in the insured receiving a greater proportion of justice, the public increasing its confidence in recovering UM benefits, and arbitration enhancing its semblance of legal legitimacy. The “big bad” insurance companies need not perpetuate their traditional negative image. A good starting point for furthering this objective is to improve the resolution of UM coverage disputes.

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<sup>313</sup> See Harding, *supra* note 128, at 369 (stating that “[t]he protocols have had a tremendous impact on arbitration”).